

15 Md

A
COMPENDIOUS VIEW
OF THE
CIVIL LAW,

BEING THE SUBSTANCE OF
A COURSE OF LECTURES

READ IN THE
UNIVERSITY OF DUBLIN,
By ARTHUR BROWNE, Esq. S. F. T. C. D.

PROFESSOR OF CIVIL LAW IN THAT UNIVERSITY, AND
REPRESENTATIVE IN PARLIAMENT FOR THE SAME

TO WHICH WILL BE ADDED,

A Sketch of the Practice of the Ecclesiastical Courts, with some
Cases determined therein in Ireland, and some useful
Directions for the Clergy.

VOL. I.

L O N D O N :

PRINTED FOR JOSEPH BUTTERWORTH, FLEET STREET,
AND R. E. MERCIER, AND CO. DUBLIN.

1798.

10

COMPENDIOUS VIEW

OF THE

CIVIL LAW

AND THE SYSTEM OF

A COURSE OF LECTURES

READ AT THE

UNIVERSITY OF DUBLIN

BY ARTHUR BROWNE, ESQ. B.T.C.D.

PROFESSOR OF CIVIL LAW IN THE UNIVERSITY, AND
REPRESENTATIVE IN PARLIAMENT FOR THE SAME.

TO WHICH ARE ADDED

A TABLE OF THE PRINCIPLES OF THE CIVIL LAW, WITH
THE CHIEF PARTS OF THE CIVIL LAW, AND THE
DIFFERENCES BETWEEN THE CIVIL AND COMMON LAW.

VOL. I.

LONDON

PRINTED BY JAMES BOWEN, ST. MARTIN'S LANE.

AND A. E. MERRILL, AND CO. DUBLIN.

1793

TO THE
PROVOST,
FELLOWS AND SCHOLARS,
OF THE COLLEGE OF THE HOLY
AND UNDIVIDED TRINITY,
NEAR DUBLIN.

THIS WORK IS
MOST HUMBLY DEDICATED,
BY THEIR OBLIGED AND
DEVOTED SERVANT,
ARTHUR BROWNE.



P R E F A C E.

MY principal object in publishing the following Lectures has certainly been to prove industry, and to shew that I do not wish to hold any office, as a sinecure. I cannot however but think, that they may be useful to the younger members of the Bar, who may wish to gain some general knowledge of the Civil Law.

It is surprizing how few gentlemen of the legal profession, (excepting those and they are not numerous, who have studied
in

in Scotland,) are acquainted with this science, notwithstanding the encomiums bestowed on it by Lord Mansfield and Lord Hardwicke, and the constant references to it in books of reports. I have always ascribed this defect not to want of diligence, but to the nature and quality of the treatises on the subject, for in quantity and number they are abundant.

Domat is calculated for the meridian of France. Ayliffe's work, tho' learned, is dull and tedious, and stuffed with superfluous matter, delivered in a most confused manner; the beautiful sketch of Mr. Gibbon is too short, and like all his writings, presupposes rather than conveys knowledge: Woods's Institute, tho' an excellent work for the student, pursues a method

P R E F A C E.

iii

a method not familiar to the English lawyer. Taylor's Elements, tho' highly respectable, are filled with heterogeneous matter, amidst which the Civil Law seems to be considered but collaterally, insomuch that he has acquired from Gibbon, the character of a learned, spirited, but *rambling* writer. Lastly, Heineccius an author powerful in erudition, by a German dress and sectional form, disgusts the English eye.

It occurred to me, therefore, that a short work in the method and order adopted by Mr. Justice Blackstone, in his Commentaries on the Laws of England, as nearly as the spirit of the two laws would possibly allow, might by the familiarity of its order, entice the student of the Common Law, to take at least a cursory and general view of this more ancient code, when the conciseness of the sketch could

not

not possibly encroach on his time. If the text be still uninteresting to him, perhaps some of the notes as far as they relate to the Statute Law of this kingdom, or contain any new matter, may engage his attention. I have called it the *Substance* of Lectures, because the reader must naturally suppose, they were longer when delivered, much having been omitted which was adapted only to academical research, and classical enquiry. I am aware that an objection may be started (the very converse of those above mentioned to the prolixity of Civilians) viz. to the brevity of the work. From those deeply versed in the Civil Law, the objection is fair, nor is it supposed that it can be of use to them. except as an abridgment, *in adjumentum memoriæ*. But it would come with a bad grace from the idle theorist who has not industry, or the busy practitioner of Com-
mon

P R E F A C E.

ix

mon Law, who has not time to peruse works of greater length, and for such it was principally intended, that he who runs may read*. Prolixity would have given little trouble, conciseness gave much. Quotation and indiscriminate transfusion would have swelled the work, with moderate pains; but compression and selection of points really important were attended with considerable labour.

In short, my hope has been that the Student at the Inns of Court, after perusing the inimitable Commentaries on the Law of our own Countries, might be tempted to look into an Epitome of the

* If deeper research be desired, the parts of the Corpus Juris Civilis to be read on each subject, are mentioned in the respective Lectures, so that while conspicuous remarkable portions are selected and abridged, a general course of Civil Law is pointed out.

b

Civil,

Civil, not presuming to any the smallest emulation in merit, but whose comparative extent is proportionate to the comparative importance of the two Laws to him.

The English Forum sometimes treats the study of the Civil Law with levity, but may its disciples be permitted to say, that it never was despised, but by those who are ignorant of it. The very numerous cases in our books of reports, referred to in the following pages, in which the utility of this knowledge was eminently conspicuous, are so many irrefragable proofs of its advantage to the Common Lawyer.

CONTENTS.

CONTENTS.

INTRODUCTORY LECTURES

	Page
On the utility of the study of the Civil Law. - -	3
On the comparative merits of the Roman and English Laws. -	26
On the Law of Nations. - -	55

BOOK I.

OF THE RIGHTS OF PERSONS.

LECTURE I.

<i>Husband and Wife.</i>	Page 1
--------------------------	--------

LECTURE II.

Husband and Wife continued. - Page 37

LECTURE III.

Master and Servant. - 52

LECTURE IV.

Father and Son. - 69

LECTURE V.

Guardian and Ward. - 87

LECTURE VI.

Corporations. - 99

RIGHTS OF THINGS.

LECTURE I.

Origin of Property and Division of Things. 129

LECTURE

CONTENTS. 13

LECTURE II.

Of Things or Hereditaments Incorporeal. - 138

LECTURE III.

Of Estates in Things. - 149

LECTURE IV.

Of Estates upon Condition. - 163

LECTURE V.

Of Estates in Jointenancy, Coparcenary and Com-
mon. - 175

Of Remainders and Reversions.

LECTURE VI.

Law of Descents. - 181

LECTURE VII.

Of Title by Occupancy. - 200

LECTURE

LECTURE VIII.

*Of Title by Prescription, Escheat, Forfeiture and
Alienation.* - - 214

LECTURE IX.

*Of Title by Gift; inter vivos, mortis causa, and
propter nuptias.* - - 228

LECTURE X.

Of Title by last Will or Testament. - 242

LECTURE XI.

Of Title by Contract. • • 331

AN
EXPLANATION

OF THE

MARGINAL QUOTATIONS

FROM THE BOOKS OF THE CIVIL LAW.

THE Institutes of *Justinian*, book the first, l. 1. 2. 3 & title the second, section or paragraph the third 4th and fourth.

Digests, book the first, title the second, law D. 1. 2. 3. the third, and paragraph or section the fourth. 4th

Digests, book the first, title the second, law D. 1. 2. 3. the third. *Pr.* in *Principio*, and *fin* in *fine ejusdem legis*. *Pr. fin.*

Digests, book the first, title the second, and laws the third and fourth. D. 1. 2. 3 & 4.

Law the first, section or paragraph 33, beginning with the word *Furtum*. *ff.* signifies the Digest, and the words *de Furtis* denote the title thereof. L. 1. 33 *Furtum ff. de Furtis.*

Code

LECTURE VIII.

*Of Title by Prescription, Escheat, Forfeiture and
Alienation.* - - 214

LECTURE IX.

*Of Title by Gift; inter vivos, mortis causa, and
propter nuptias.* - - 228

LECTURE X.

Of Title by last Will or Testament. - 242

LECTURE XI.

Of Title by Contract. • • 331

AN
EXPLANATION

OF THE

MARGINAL QUOTATIONS

FROM THE BOOKS OF THE CIVIL LAW.

THE Institutes of *Justinian*, book the first, l. 1. 2. 3 & title the second, section or paragraph the third 4 and fourth.

Digests, book the first, title the second, law D. 1. 2. 3. the third, and paragraph or section the fourth. 4

Digests, book the first, title the second, law D. 1. 2. 3. the third. *Pr.* in *Principio*, and *fin* in *fine ejusdem legis*. *Pr. fin.*

Digests, book the first, title the second, and laws the third and fourth. D. 1. 2. 3 & 4.

Law the first, section or paragraph 33, beginning with the word *Furtum*. *ff.* signifies the Digest, and the words *de Furtis* denote the title thereof. L. 1. 33 *Furtum ff. de Furtis.*

Code

Code, book the first, title the twelfth, law the eighth, and section or paragraph the second. C. 1. 12. 8. 2.

The *Novels*, Constitution the eighty-ninth, and chapter the ninth. Nov. 89. c. 9.

Authentic, Collation the ninth, title the ninth, and novel the twentieth. Auth. 9. 9. 20.

All these books of the Civil Law are sometimes quoted by the initial word of the law itself; and by the words of the title: As, ff. Qui totam Hæreditatem, ff. De acquir. vel omit. Hæred.

The Digests, which are also called the Pandects, are therefore frequently quoted also by the letters *ff.* a barbarous method of expressing the Greek letter ϕ .

12.
89. c.
9. 9.

INTRODUCTORY LECTURES

ON

The Utility of the Civil Law,

ON THE

COMPARATIVE MERITS

OF THE

ROMAN AND ENGLISH LAWS,

AND ON THE

LAW OF NATIONS.

INTRODUCTORY LECTURES

The Unity of the Civil Law

COMPARATIVE METHOD

ROMAN AND ENGLISH LAW

THE LAW OF NATIONS

INTRODUCTORY LECTURES. (1)

Int. Lecture the First.

O N

T H E U T I L I T Y

O F

T H E S T U D Y O F T H E C I V I L L A W .

THE Lustre of the Roman name which has dazzled all succeeding ages, beyond their hope of competition, was not confined to arms. It was the peculiar glory of the nation which subdued the world, to furnish mankind with a code of laws, containing the most perfect system of justice and equity between man and man, which has ever been produced by human invention. I say between man and man, to avoid the excep-

(1) Usually called *Praelections* in the University of Dublin.

tions which may possibly be taken to its public regulations, as fraught with an arbitrary spirit. And when it is called the most perfect of human codes, the epithet means not to assert an entire freedom from defects, which must be incident to every human institution. But this we may affirm with safety, that as a collection of written reason ; as a great body of principles founded in natural equity (2), it has no rival. The general excellence of its rules, and justice of its decisions, have extorted from all the nations of Europe, an acknowledgment of its pre-eminence. They have in consequence either adopted it, as their own municipal law ; or where circumstances and events forbid so general an admission, have been glad, in all cases where their own laws were silent or imperfect, to search out the dictates of natural equity, in the illustrations of this code. Hence tho' the phrases, Civil and Municipal, are in strictness of speech, synonymous, yet the law of Rome, (as if the world was yet one state under its dominion) has emphatically vindicated to itself, the title of the *Civil Law*.

(2) As a pattern therefore, it must be admired and consulted, even where it has no binding force.

That

That it has obtained this pre-eminence, we shall not wonder, when we reflect on the superior advantages which attended its formation. Most laws, (not excepting those of England) have been immaturely born in the early times of rudeness and barbarity, and receiving their accretions from chance, or sudden emergency, appear deformed masses composed of ill jointed, ill proportioned members; The Laws of shreds and patches.

With us, the most liberal constructions and interpretations of the Law by judges, perpetual new acts of the legislature on the spur of the occasion, together with the creation and advancement of separate courts of equity, have been necessary to support a structure, which, barely sufficient for convenience never can admit much beauty. Far different was the fortune of the Civil Law. It originated in times of the highest civilization, the offspring of philosophy (3) and science. The compilers of it tho' at the head of the legal profession, were not mere lawyers, but philosophers and statesmen. Nor were they confined to the

(3) It is amusing to observe, how the principles of the philosophy of the Ancients, especially of the Stoic Discipline, shew themselves frequently throughout this Code.

resources

resources of their own minds. The labours and compilations of many ages and countries, beginning with the foundation of Grecian legislative wisdom, afforded them powerful auxiliaries. Under their auspices, the Institutes of Justinian appeared in all the beauty which method, arrangement, and even the ornaments of style could add, to the natural charms of truth and equity.

It should seem scarcely necessary to state more than has been premised, in order to establish the object of my present Prælection, which is to point out the utility of studying the Civil Law, and to shew, that the labour of its disciples will not be ill bestowed. To use the language of an eminent author, did we find nothing in this law but a more thorough knowledge of the great principles of justice—a more accurate delineation of the boundaries between right and wrong—a series of excellent rules applicable to our own conduct, and to all the affairs of human life; sublime and elevated notions of philosophy and religion; it surely must be entitled to the highest place in our esteem. Will the liberal mind deny, that such an investigation must be amply repaid.

But

But exclusive of its abstract theoretical excellence, this study offers the most signal aids, both in the transactions of individuals and in the intercourse of nations,

In the first place—the Civil Law is an excellent repository of those rules, which ought to guide the natural conduct of states, and contains in its bosom, the law of nations, as well as of nature. It is evident that nations in their transactions with each other, must have a common appeal to the law of nature and right reason. But this is originally an unwritten standard. The philosophic Roman legislator may be said to have reduced it to writing, and the world has decreed, that to his rules as declaratory and explicative of the law which right reason has dictated to nations, the appeal shall lie. It becomes therefore a science absolutely essential to the statesman and negociator. No where will they find, the rights of embassadors, the laws of war, the rules of federal construction, so well, or so accurately laid down.

Grotius and other writers on public law, have drank deep of these springs, and acknowledged their obligations to the Roman code. It is impossible for us even to understand the technical language

language or mode of reasoning of foreign powers, without reference to this law. Some writers (4) have imputed that superiority in negotiation which foreigners, particularly the French (5) claim over us, to their superior knowledge of the civil law. They probably attribute too much efficacy to a favourite study, but that this comparative ignorance must have its effect can scarcely be doubted. How is that man qualified to settle and confirm a treaty who does not know the subsequent construction which it may admit, or the rules which are to guide and govern its interpretation. How can we answer the claims and manifestos of other nations, if delivered in phrases and resting upon principles and rules of argument with which we are unacquainted. (6) Leagues and alliances, tariffs

(4) E. G. Aycliffe.

(5) This superiority, if true, is probably owing to the nature of their government—better formed for *secrecy* and *dispatch* than ours.

(6) A remarkable instance was offered not many years since of the utility of this knowledge upon such occasions by that prodigy of universal science, Lord Mansfield, the dawn of whose celebrity was not a little brightened by his answer to the Prussian Manifesto, relative to the Silesian loan about 1753.

and

and pacts of commerce, treaties of peace and proclamations of war, all the disputes in Europe about the right of succession and limits of territory (7) have such a reference to this law, that without some acquaintance at least with its outline, modern history is unintelligible.

Having discussed the advantage of this pursuit in public, we proceed to speak of its use in private affairs.

If we regard the Continent, proofs are unnecessary; a momentary view will suffice. The Civil Code among most continental nations is the Common Law of their land, and governs all the transactions of individuals with each other, whenever it is not modified and controuled by positive ordinances, or opposed by constant usage to the contrary; and from its principles light is borrowed, if the positive statute laws are ambi-

(7) Add the discussion of such disputes, as whether wars have been commenced justly—proclaimed in due form.—Whether in the conduct of them, the laws of war have been observed; all which points are decided by the Law of Nations, whose best expofitor is the Civil Law.

guous or imperfect (8). This is the case particularly, in Holland and all the United Provinces (9), where it has obtained a greater authority than in any other country, perhaps on account of the excellent laws of trade, which it furnished to that commercial nation. The practitioners in their courts refer to the Roman Edicts with the same familiarity, with which we speak of an act of parliament (10).

In Germany, the Affessors or Judges of the Imperial Chamber, (which is the Supreme Court of the Empire) swear upon entering into their office, that they will judge all causes according to the ordinances of the Empire, or in defect of them according to the Roman Civil Law; and all writers agree, that it is the common law of the

(8) So, often in England: take this example; As to the distributions of intestates effects, where our laws are ambiguous or not sufficiently express, our courts are chiefly guided by the doctrine of one of Justinian's novels.

(9) Especially Friseland.

(10) The Senatus Consultum Tertullianum, or the Lex Falcidia is as well known to them, as the statute of frauds, or entails is to us.

Empire

Empire (11) though it prevails less in the northern parts, especially among the Saxons than elsewhere. (12) The same with little alteration may be said of *France*.

If we turn to Italy, we see indeed the Venetians, who always maintained their liberties against the Roman Emperors, partially adhering to their own laws, and rejecting even wisdom when moving from a hostile region. But in the Papal Territories, and more especially in the city of Rome where the Canon Law might expect undisputed supremacy, it frequently gives place to its celebrated rival which reigns even in the Roman

(11) The several districts and divisions of the Empire have their respective constitutions, ordinances and provincial customs, but these are all in subordination to the Civil Law, are expounded by it, and when they are silent or deficient, that law is always introduced.

(12) The Imperial Chamber consists of the Counts and Barons who are called Presidents, and their Assessors. These Assessors who are in fact the Judges, (the Presidents in general not being acquainted with the laws) are required to be well informed in the Civil and Canon Laws, and have usually spent a considerable time in the study of those laws in their universities.

Rota (13). In the other European states, admitted in different degrees, it stands the interpreter of Municipal Law, and points the road to judicial station. Even in our neighbouring kingdom of Scotland, the form and practice of the Civil Law is observed in all their proceedings, and not many years since this knowledge was universally coveted by the gentlemen of that country, even those unconnected with profession, not merely as an avenue to profit, but as a most useful exercise of the understanding. If then we have any commercial or other intercourse with foreign nations, if we would wish to understand their history, policy or constitution, here is the proper and necessary clue to guide our steps.

Its benefits within our own national domestic sphere, are next to be estimated in the balance. In the Courts, Military, Maritime and Ecclesiastical, its predominance is universally known. The first are by disuse almost fallen into oblivion, but the jurisdiction of the Court of Admiralty in England, is of great moment and extent; and as the late expansion of our commercial rights, will necessarily produce in this country, many novel and important questions, an accurate knowledge of

(13) The Roman Rota resembles our Court of Chancery.

the

the law of nations (the great expounder of which as has been observed is the Civil Law) will be more than ever necessary. In all suits to which the Ecclesiastical Courts are competent, the Civil Law has great influence. In testamentary Causes it rules. Undoubtedly in many cases, Common and Statute Laws will interpose their power in the form of prohibition, but still the subjects over which they have a peculiar jurisdiction are exceedingly numerous; over this extensive field, the Civil and Canon Laws bear united sway, the former usually (14) paramount, the current of the latter defying pursuit, without a previous knowledge of its parent stream, on whose model it was formed, and from whose sources it has copiously borrowed.

An endeavour to persuade the common lawyer to prosecute the theme of our present commen-

(14) Indeed perfectly so in the Courts Military and Maritime, and in testamentary Causes in the Ecclesiastical.

Mr. Reeves observes, that when the Court of Admiralty was erected, the Laws of Oleron constituted a National Code of Maritime Law, for the discretion of that Court, and whatever was defective therein was supplied from that great fountain of Jurisprudence, the Civil Law, which was generally adopted to fill up the chasms that appeared in any of the Municipal customs of Modern Europe.

• dation,

dation, may be thought to admit more difficulty. It would certainly be pedantic to deny, that many lawyers may and do reach the summit of wealth and reputation, without its aid. A certain technical knowledge, assisted by exterior qualities or fortunate events, may often acquire the smiles of fortune and of fame. But still, it will be true, that the man whose philosophic ambition aims at something beyond the skill of an able attorney; *Qui vult rerum cognoscere causas*; who with a scholar's mind, wishes to know the rudiments and origin of the rules laid down for his instruction, ought to be a disciple of Justinian as well as of Coke (15). How is this position (it may be asked) consistent with a truth universally known, that the foundations of the Common Law were laid in the Feudal system? Feudal principles indeed supplied the foundations, but were utterly incompetent to the superstructure. They breathed only war. Strangers to commerce and the arts of peace, they regarded landed property in the hands of the vassal, only as the instrument

(15) The great judge who with so much glory presided at the head of the Law for one and thirty years, has manifested to the world, how much the mind of the Common Lawyer (often in former times too narrow and confined) may be liberalized and extended, by a previous knowledge of morals and of the Prætorian Law.

of

of military strength, and the source from whence the lord derived his supplies. On contracts, covenants, obligations, those vast fields of modern controversy; in short, on all things called in the metaphysical language of some legal writers (16), *things purely rational* (17), that system was silent. To these deficiencies the full treasures of Imperial Jurisprudence offered a ready supply. It was eagerly (18) grasped, and all the learning of our early writers, Bracton, Britton and Fleta, upon these subjects, shines in borrowed plumes. In process of time, when the rude spirit of antient chivalry was calmed, when the shackles upon alienation were struck off, and wiser policy calling the attention of the nation to its commercial advantages and insular situation, expanded our sails over every field of the ocean, a new series of transactions arose amongst men—new subjects of controversy—new sources of litigation, and difficul-

(16) Ayliffe—Wood, &c.

(17) *Entia rationis*; moral entities—*Vide Puffendorf's Introduction.*

(18) This Law was the favourite of churchmen, who in fact formed great part of the Lawyers of the time, and thence it is no wonder, that it should insinuate itself by insensible degrees into the English jurisprudence.

The *maxims, rules and reasonings* of the Civil Law have often been *adopted* or used by way of *illustration* by our Common Lawyers.

ties

ties, which found no resolution in Feudal regulations. Hence much of the Civil Law, which had diffusively treated of these matters, was incorporated with our own, tho' by long use, the debt is forgotten, and we are apt to consider it as part of our original stock (19). If we add to these observations, one further consideration, that, great part of the business of these countries is done in Courts of Equity, whose rules and practice for the most part, trace their descent from the Roman Forum, and that in Ireland, no distinction is made between the Common and the Equity Lawyer, there will not appear much room for contemning in the temporal courts, the knowledge of the Civilian.

These considerations have induced me to make the experiment, whether an attempt to read a Course of Lectures, instituting a comparison

(19) Because after this insinuation and incorporation the distinction does not appear—and because it derives its binding authority from ourselves. Besides these ideas, many others have been evidently taken from the Civil Law. E. G. Informations *ex officio*, by the Attorney General, and felons not having counsel, and witnesses for them formerly not having been sworn; but the instances are so numerous, that I must refer the reader to the following work at large, where he will find them in every page.

between

between the Roman and English laws—expounding the former, and marking the rules, principles and practice which it has transmitted to the latter, might be acceptable to the public and the University. That forensic studies are very properly made a branch of University learning, has been ably argued by the celebrated commentator on the Laws of England, and every plea which can hold for introducing into this place the study of the Common, has tenfold force when applied to the Civil Law; accordingly Professor Hallifax at Cambridge, and Dr. Beaver of Oxford, have lately obliged the world with a sketch of their labours in this department. But above all, the learned Professor of Glasgow receiving the additional encouragement which must attend this study in a kingdom where it so nearly approximates to the Municipal Law, has acquired most deserved celebrity, and has attracted many of the youth of this country, as well as of England within the sphere of his instruction. Without pretending to vie with such illustrious names, I shall have the satisfaction of reflecting, that I have at least endeavoured to prevent the office I hold from being a sinecure, and have set an example of labour to future

D

(20) and

(20) and more able Professors, who may deprive the wandering Student of every reasonable pretext for seeking this knowledge abroad; whither, in most branches of learning however, not so much necessity, as prejudice in disfavour of their own nation, added to the pursuits of pleasure and love of travel usually lead them. Much has been done in the Medical line to overcome the necessity of resorting to the schools of our indefatigable Northern neighbours. Let it be a pattern to Jurisprudence.

Before I conclude, permit me to make some annotations on the objections which may possibly occur, to the utility of such a Course of Lectures, as well as to the advantages of this study in general. These may, I think, be reduced to three. The first is—That many heads of the Civil Law are now become mere matters of curiosity, nothing analogous to them existing in modern institutions.

(20) Far be it from the writer to insinuate any thing in the most remote degree against his predecessors;—their avocations,—their tenure being only biennial. Their professions which must have called their attention to studies very different from those of the Law, shew sufficiently why they could not have much applied to this business.

Undoubtedly

Undoubtedly that Professor would act erroneously, who should employ the same time and labour in treating of obsolete doctrines, such as servitude, adoption and legitimation, which would be required by subjects still forming considerable branches of the jurisdiction of our modern Courts, for example—marriage and testaments. But surely, the objection, that the former enquiries are useless, could no where be more unfortunately urged, than to the Academic. Enquiries which tend to illustrate Roman History and Antiquities (21), and to explain numberless passages, words and phrases in Classic Authors, can never appear uninteresting to the Scholar. The man of taste will be charmed with the dress,

(21) In such illustrations so much has been done by Heineccius and others, that I can claim little merit therein, but that of a compiler. Indeed all lectures are compilations; but let it not thence be foolishly argued, that they are useless. The Student might have recourse to the original books and compile himself; but will he do so? It requires probably more time and labour than he is willing to bestow. But, when the labour of another has heaped together knowledge from many detached books, then he will receive instruction. Besides, the man who does not read at stated times, scarce ever reads with effect; and that is one great use of Lectures. The Student is obliged to learn something *every day*.

which Law (often branded as a Science rude and uncouth) has here assumed. The Pandects are written with a beauty and elegance of style, which has wrested this celebrated encomium from eminent critics, that the Latin Tongue might be recovered by their aid, tho' all other authors were lost

To deny that such works court our perusal, will sound harshly in the Collegiate Ear.

The greater portion of this learned body cultivates, or is designed to pursue the studies of Theology. To them as has often been observed, this science holds forth the most interesting information. The New Testament was written, and the sacred events recorded therein, happened, in countries subject to the Roman yoke, and where Roman manners and customs were universally diffused; of course, the allusions to the laws and usages of that nation are frequent, and an acquaintance with them tends, in no small degree to illustrate and explain the Scriptures. Dr. Halifax has made the same observation, and particularly and justly applied it to the writings of St. Paul.

Lastly

Lastly, let it be remembered in reply to this objection, that if we seek in other Laws, such knowledge as may suggest useful additions and improvements in our own, our researches must not be confined merely to the correspondent parts.

I proceed now to a second objection made to the dignity of this study, which is—that however just the encomiums which have been bestowed on the order of Institutes, and the style of the Pandects, yet that the whole body of the Civil Law taken together, is a confused, indigested mass, without order, beauty or harmony.

It must be admitted, that the Digests or Pandects are only collections of fragments extracted from the written opinions of various Lawyers, and the Code is a compilation from the Constitutions of different Emperors. In the junction of such detached members, we cannot always expect regular series, and some of the parts may appear contradictory (22). But

(22) It is said also, that they are often applicable only to particular cases, from whence no general principles can be drawn, and many Laws which are found in one part of this Collection are altered or amended in another.

The same, perhaps, may be said of any Code whatsoever.

when

when we consider that the Institutes, celebrated for perspicuity and method, furnish an index and clue to this apparent labyrinth—that such noble materials exist which require only the labour of arrangement, and that this labour is, in these days almost entirely saved, by the indexes and notes of numberless Commentators, such cavils will vanish or appear the language of idleness. Were they founded in truth, they would but prove more strongly the propriety and advantage of Lectures on the subject, regularly arranged.

The last and most grievous accusation against this Law is, that it breathes an arbitrary spirit, repugnant to those principles which ought to be inculcated on the minds of the youth of these countries. Of this charge, I should esteem it a difficult task indeed to undertake the refutation, a labour which however Giannoni has not refused in his celebrated History of Naples (23). He insists that this stigma originated in false constructions of ambiguous passages, made by the adulators of Frederick Barbarossa then meditating encroachments on the liberties of the Empire. This opinion is supported by some modern writers

(23) A work strongly recommended to Civilians by Earl Mansfield.

even

even among ourselves. Dr. Hallifax seems strongly to countenance the opinion in a note to his Preface. However, they seem to me to view the subject with a lover's eye, who not content with a thousand excellencies in the object of his affection, wishes to assert a total exemption from defect; I must acknowledge that it appears to me, that the Maxim—*Princeps legibus solutus est*—and others of a similar nature, cannot be explained away. It is true, the practice did not always coincide with this theory, because no Governors can expect a permanent obedience to Laws, which they totally despise and transgress themselves. And besides as civilization advances, and manners are polished and softened, the genius and temper of a nation by insensible degrees, puts a controul on powers unlimited by the Law and Constitution. Thus in France, many powers constitutionally existed in the Monarch, which though he would not voluntarily renounce, the genius of the times forbid him to exercise; and history informs us, that many of the Roman Emperors were scrupulously observant of the Laws.

Thus stands this well known charge, which true or false has, in my humble opinion, no relation to the present undertaking. The arbitrary Imperial

Imperial claims could only relate to the constitution and rights of the public, and did not intermeddle with private Justice. It is my business to treat of the rights of individuals with respect to each other, and the law by which the mutual controversies of private men were governed and regulated. A law may be unfavourable to general liberty, and yet make excellent regulations respecting private property. This, in my opinion, is the case with the Civil Law. I am to treat of the relations of private men to each other, not of the relations of individuals to government and to the public—the rights of property, not of liberty; and if questions of public policy and constitution should sometimes necessarily intervene, can a more acceptable service be done to the rising generation, than to shew them the comparative inferiority of all other constitutions to their own. Let us not shut our eyes to Institutions containing much good, because they also contain some evil. Discrimination and selection are proper employments of human industry. Let us cull the fruits and reject the weeds—admire where admiration is due, without bestowing injudicious undistinguishing approbation—and learn by contemplating the mischiefs resulting from other forms of government to love and
revere

revere our own, and study to preserve it from all its enemies—from the violence of Anarchy, as well as the encroachments of Despotism. Happy in the reflection, that if other states have more accurately distinguished the rights of property, no constitution has so nicely guarded and defined the privileges of Freedom.

Int. Lecture the Second.

ON THE COMPARATIVE EXCELLENCE

OF THE CIVIL AND COMMON LAWS.

IN the preceding Prælection I have discussed the utility of the study of the Civil Law. The object of the present is a brief comparison between the Civil and Common Laws, as to their respective excellence. A more detailed one runs throughout all the subsequent Lectures, but it was deemed useful to give an abridged view of their analogies and discrepancies in an Introductory Lecture. The contest of prevalence between them has long since ceased, but this contest, conducted on political rather than philosophical grounds, engendered a cloud of heat and prejudice which long obscured a fair comparison of their merits. At this distance of time, we can consider the subject with dispassionate ken, and not deny occasionally the preference to each, as
each

each in its turn has best regulated specific subjects. A blind attachment to either is absurd, and while I feel a predilection, founded, as I humbly conceive, on reason and reflection, for many parts of the Roman Code, and without quoting infinite authorities, am fortified in my opinion by one of the greatest Lawyers (1) of this or any age, who has pronounced it the first collection of written reason that ever existed, I am willing to admit many and various instances of pre-eminence in our domestic institutions. As to the obligations which the English Legislator has owed to Justinian, they have been treated of in the former Prælection, and are not the objects of our present discussion. My immediate aim here, is to compare the diversities of the British and Latian Codes. Not that it can be expected that the limits of this treatise will admit many points of comparison; to contrast them in a few striking instances, is all which the contracted space of this species of composition will admit, while at the same time, I may be able to convey to the Student some knowledge of the correspondent heads of each Law.

(1) Lord Mansfield.

In an Introductory Lecture, so essential to my general plan, but so purely didactic, the auditor must not demand that embellishment so often expected from this Chair, nor suppose that the severity of Law can catch the varied lights of Poetry, assume the garb of Eloquence, or vest itself in the colours of the Historian. Even the celebrated Commentator of England, who soars far above the ordinary path of didactic composition, has scarcely attained praise for more than unornamented neatness of style. My object is instruction, not decoration

The Municipal Law both of Rome and Britain is distinguished into the Civil and Criminal, and the Civil again into that which treats of the rights of persons—of the rights of things, and of actions or remedies for the redressing of wrongs, and in both Civil and Criminal, the Modes of Trial, and the Forms and Constitutions of Tribunals will naturally offer themselves to our consideration.

We begin with comparing Personal Rights. And here the English Laws have a total and undisputed preference. The Law of Persons at Rome, was the Black Code of Personal Slavery. Liberty, says Montesquieu, speaking of the political

litical Oeconomy of Rome, was in the centre, Slavery in all the extremities. He might have added, that liberty germinated in the root of domestic Oeconomy, but Slavery withered every rising branch. The master alone, possessed the odious privilege of tyrannizing over all his family. Imagination cannot aggravate the picture of oppression displayed in every private mansion of Rome, the renowned Domicile of public Liberty. Each roof resounded with the cries of the tortured Slave, whose subjection bore no resemblance to the honest servitude of our menial domestics; whose unprotected rights boasted not even those slender fences which surrounded our ancient Villein, and retarded the rapacious violence of Gothic Feudality; whose torments have only been paralleled by the horrors of that Colonial System, which has disgraced humanity in later days. Like the modern African, he saw his children liable to be torn from his embrace, and hurried into the cruel arms of distant captivity, but he did not, like him, view in tantalizing contrast, security and happiness hovering over the children of his master. They were equally exposed to the arbitrary will of one common ruler, modified only by variety of temper and gradations of paternal tenderness or obduracy. Neither Son nor Slave could acquire property

perty to alleviate Servitude, or redeem bondage. Their acquisitions merged in the Patriarchal Lord, who presided with unlimited sway over their subjected interests, and determined their happiness or misery at his pleasure. Nor had the Liberty or Security of the marriage state attained to a much more elevated degree. In the later and politer times of Rome indeed, the husband, by self refinement, as well as general habits, was restrained from personal brutality, and the separate property of the wife was sufficiently secured by settlements in some measure resembling ours, but the marriage chain was of the most dissoluble texture, and broken on the slightest causes. Cohabitation during the period of one year, constituted a marriage, styled *by use*, and separation for the shortest space of time before its expiration, annulled the union. Proofs the most vague and unsolemn produced divorce. When the marriage tie was so slight and uncertain, domestic felicity was fugitive and fickle. The education of children must have been neglected, tho' their legitimacy on account of this lax state was more favoured than with us. Thus children born before marriage were legitimated by Law, a doctrine attempted to be introduced into England by the Canonists, and rejected by
the

the Barons, in that celebrated, concise, and energetic phrase, *Nolumus Leges Angliæ mutari.*

With respect to the fourth and last relation of persons, noticed by Legislators, that of Guardian and Ward, the principles of the Civil have been copiously borrowed by the English Jurists, yet still perhaps not sufficiently to satisfy the philosophic mind. In the eyes of some Philosophers the loan should be augmented, since the former with provident hand guarded the property not only of the lunatic and the minor, but even of the foolish prodigal, who wasted his substance in riotous living; yet in placing women under Guardianship at all ages, and in any situation, they offered an affront to the sex, and one surely irrational, superfluous and insulting; and the legal restraint of prodigality tho' imitated by Germany and Holland, countries accustomed to arbitrary rule, is justly rejected by Liberty, ordaining freedom of action to all endued with reason, and by Commerce, demanding the unshackled alienation of property. If the Romans, however, should be thought to have any superiority in regulating personal rights, to this branch it is confined.

We proceed now to the Rights of things.
In their division of things, both Laws are equally
minute

minute and accurate, but in the partition of estates in things, the *Lucidus Ordo* of the Civil Code predominates. The Civilians knew nothing of that puzzled distinction between real and personal property, which pervades our legal system of ownership, which causes different species of property to descend in varying lines, and to different persons—which obliges the heir, who controverts the pretended will of his ancestors, to litigate a double suit, before a Temporal and also a Spiritual Tribunal, perhaps with opposite success, and repugnant decisions—which deprives a great part of the community possessed of valuable leasehold interests, of that share in the Constitution which is possessed by the impoverished cottager at their door—which involves the creditor in endless labyrinths, by discriminating different modes of executions adapted to the various distinctions of the debtors property, liable to his demand. They knew no feudal fictions, which hamper our alienations, and load our conveyances two hundred years after their causes have ceased, while the Sage trembles to touch the wren, now become part of the Constitution. Simple and uniform in their regulations, clear and pellucid in their divisions, they subjected lands and goods to the same dispositions, and
transmitted

transmitted them in the same conduits to posterity.

Let it be observed, that I have praised the simplicity of the disposition without as yet extending my observations to its effects. Uniformity and utility are not necessarily connected. All property descended in the same manner, but the mode itself may not be equally laudable with its unity. All property gavelled; with us gaveling is almost considered as a punishment, and has actually been made the instrument of Penal Laws. Yet gaveling is the policy of Republics; it hurts the pride of families, it prevents the growth of estates, it forbids the towering castle to rise, and the immense demesne to spread, and swell the arrogance of Primogeniture; but the Romans revered not the first-born; Liberty did not glory in the vast possessions of her Sons. The conquerors of the world were taught to subdue themselves, and to found their pride on the extended dominions of the State; content as individuals with limited patrimony, their ambition as a people was to acquire unlimited dominion. They followed the original impulse of nature and reason implanting in the parental bosom equal love to all the progeny. The doctrine of primogeniture may be adopted

F

by

by Legislators, and commended by Philosophers, but it certainly originated with barbarians, and was nursed by savage pride. The preference of the male to the female line, was equally unknown at Rome, nor was the daughter any more than the younger son, left a dependant on the mercy, or a claimant on the justice of the elder brother. The absurd consequences also, which arise from our marked distinction between the whole and half-blood, are the offspring of the Feudal Law, and strangers to the Jurisprudence of Justinian.

As to quantities of estate, the proprietor of land might hold, as among us, an estate for ever, not in Fee Simple, but Allodially. I need scarcely remind my auditors, that the descendants of the Northern nations were all supposed to derive their lands from the Prince, and to hold under him. Thus, with us all land is supposed to belong to the King, and all we, petty men, walk under the huge stride of this Collofsean principle. The highest estate was but in Fee Simple, held by stipendiary service, Feodum coming from *odh*, possession, and *fee*, wages. Of this haughty policy, born in camps, and bred by war, the Italian

lian land owner never heard, till waisted on the din of arms, from the hostile regions of the North. With Estates entailed, they are said, by Gibbon, and many others, to have been utterly unacquainted, nor would Commerce, which with us has undermined their effects, have had operation upon a nation of warriors; yet something analogous they appear to me to have known in later times at least, under the name of Substitutions, a name also given to some species of remainders, with whose nature they were also intimate, both in theory and practice; and as frequently, the T. in Tail, or Remainder Man, not being a Citizen of Rome, could not hold property, the heir was made trustee for him, by what was stiled a *fidei commissary substitution*, which among other causes introduced the doctrine of trusts at Rome as extensively as among us, our trusts corresponding to their *fidei commissa*, not to their *usus fructus*, as the name might at first hearing induce the student to believe. Their doctrine of incorporeal hereditaments is too minute to bear analysis at present.

We come now to their Canons, for finding out the heir, or person to whom the estate was to de-

volve on the death of the last possessor. They fled the absurd principle which decrees, that right to land never can ascend, and bequeaths the property of the childless and intestate, to his most distant relation, in defiance of parental claims, echoed perhaps by indigence and affliction, for which preposterous rule my Lord Coke can assign no better reason, than that land is heavy, *et gravia deorsum tendunt*. With more reason may we justify that Law of Descent in England, which, in the search for a remote heir, guides us to the blood of the ancestor from whom the estate first descended, and as it came from the paternal or maternal line, restores it to their family. But, perhaps, Blackstone himself, notwithstanding his particular labours in that point, has had no great success in defending the position, which for ever excludes the half-blood from the inheritance.

Our Canon of descent however has not always departed from the Civil Computation, since it makes the intestate or deceased, and not the common ancestor, the stem from which branch out all rights to personal estate; but in the partition of the branches the analogy ceases, and in consequence of varying laws of representation, and divisions, *per stirpes*, not *per capita*, grandchildren

grandchildren in Britain frequently become entitled to very unequal portions of money or goods, where Rome would have observed exact equality. And in determining the gradations of consanguinity and affinity, the Canon, and in regulating the degrees within which marriage is tolerated, the Levitical Laws are our guides, and only luminaries, without the least respect to the dogmas of the disciples of Trebonian.

Not so has Britain viewed their principles of Testamentary Law. With implicit reverence here it has copied the wisdom of the Western Empire, with so little variation, that a comparison of preference is not admissible, where similarity excludes preference, save that which prior knowledge gives the teacher over the disciple. Our Spiritual Courts almost implicitly obey the Law of *unsolemn* Wills among the Romans, and altho' to casual observation, the obligations of the Temporal Tribunals to these funds of wisdom may seem less obvious, yet upon closer inspection, they will be found to boast but small original possessions in this important province of Jurisdiction.

The Solemn will of the Romans, like our Will of Lands, was rather considered as a conveyance

ance or alienation *inter Vivos*, than as testament. In the earlier times of the Republic, the solemnities indeed were tedious, and the fictions extravagant; but the corrected regulations of later periods evidently furnished hints for the provisions in our Statute of Frauds; a connection most pleasingly elucidated by Lord Mansfield, in the celebrated Case of *Windham and Chetwind*.

The Law of Legacies has servilely copied from the Imperialists, both excellencies and faults, so as even to admit their distinctions, however unreasonable, such as between time annexed to substance and to payment. In one species of Legacies, however, attention to reason has made a notable difference, those conditioned in restraint of marriage. By the Civil Law, all conditions in restraint of marriage are void, yet here Chancery has only followed them *sub modo*, where the legacy is given over, and another person particularly substituted by the testator to have the benefit of it, in case the condition be not complied with. *Reeves v. Herne*. 2. Eq. Ca. ab. 215. page.

With more wisdom have the Institutes of the Law of Scotland disclaimed any regard to subtilities

ties peculiar to the Roman system, tho' they at the same time almost recognize it for their Municipal Law, and in matters of contract, transactions, restitutions, servitudes, tutorships, and obligations, determine all controversies accordingly. See Erskine's *Institutes* p. 15. of *Laws in General*.

Besides the Titles to Estates arising from Will and Descent, those of prescription, custom, deed, occupancy, accession and tradition were known to the Civil-Law. With respect to occupancy, which Blackstone, differing from Locke, constitutes the foundation of all property, our determinations seem to have been chiefly deduced from the Imperial, as appears from the instances selected by that illustrious Professor, respecting alluvions and derelictions of a river or the sea, a doctrine, which however unimportant it may to us in Europe appear, is at this instant of no small consequence in torrid regions, where sudden and violent alterations of the course of rivers occasion warm controversies as to the ownership of the new-found land, of which the Ganges is a memorable example. Accession is a species of occupancy. If any corporeal substance received an accession by natural or artificial means, the thing thus rendered more valuable still belonged

longed in its improved state to the original owner. If animals became pregnant, if cloth was embroidered, if ground was built upon or improved, the advantage resulted to the owner of the original subject ; and these regulations were too obviously the dictates of good sense, not to compel imitation among us.

But if the rule be strained to convert a work of genius, written on the paper of another, into the property of the owner of the naked materials, it becomes so extremely absurd, that this ridiculous imputation on the Civil Law must surely have been derived from some passages ill understood ; and I have no doubt that literary property was by no means in a state of insecurity, which would render it so much inferior to ours (2).

On the heads of Custom and Prescription, we find memorable variances between their Law and ours. With us, the time of prescription is that which is opposed by no memory of man, or record

(2) Intermixture of goods, one species of accession, by our Law forfeits them to the innocent party, tho' by the Roman a satisfaction was given to the wilful author of the confusion.

to

to the contrary ; but with them three years formed a prescription for things moveable and corporeal, and ten sufficed for things incorporeal and immoveable, if the persons prescribing inhabited in the same province ; if in divers, twenty years.

The validity, however, of the prescription, *i. e.* whether it had been an uninterrupted possession, for the three or the ten years, or whether it was a thing that could be prescribed for, might be tried in a real action, if brought within twenty, or a personal commenced within thirty. The allotment of periods for commencing these actions, corresponds with our Statutes of Limitation. The property even in things stolen, for reasons of general convenience, and public peace, was not controvertible at the end of forty years.

Every Lawyer knows that our Spiritual Courts are prohibited from trying customs. The reason is, that being guided by the Civil or Canon Laws, the first of which allowed ten years, the latter forty, to constitute a good Custom, they would have adopted their precepts and established customs as legal, tho' sanctioned by such brief duration.

Of Title by Deed, no other variation need be noticed except that delivery was not essential with them as with us ; but the debt of our Code to the Civil, is most conspicuously shewn in the branch of Title arising from Contract, to which the Civilians have reduced almost every thing

they have delivered on Duties and Rights. The obligation here, is indeed so universal, we have so little of original fund, and the analogy is so complete, that we cannot be expected to mark diversity, except in some very few instances. These relate principally to the contracts of leasing and mortgaging, and to the consequence of certain contracts, viz. legal interest.

Leases for long terms were to them unknown, a species of interest, which tho' so frequent in this kingdom, is little used on the Continent of Europe, and is surely not always essential to agriculture (3). It is even probable that they were unacquainted with irrevocable terms, and certainly the landlord claiming the farm or house leased, for his immediate occupation, had a right to resume it. But if here our policy may seem wiser, the Civil Law deserves praise when it allows for the Lessees losses by inundation, or any inevitable accident; whereas, with us, during the term, as he is secure of all adventitious gains, so in

(3) I mean in countries where confidence supplies the place. Marshall Rur. Econ. Mid. Co. 2 vol. Min. 24. says, "it may be a moot point whether under such confidence well placed, leases or no leases are most eligible." Gibbon and Young lament their want in France and Switzerland: yet surely agriculture did not pine in those countries; Picardy, when I saw it in 1779, before leases were much lengthened in France, was an ocean of corn.

. several

several cases he must bear the loss (4). With respect to barring forcible entry, even of the landlord, and enforcing the right of resumption for arrears due after certain intervals, both systems coincide. From the assertion that long leases were unknown to the Romans, must be excepted their Emphyteusis, because, tho' they expressly excluded it from the class of Leases, it bears a strong resemblance to fee farm tenures; it was a grant of land in perpetuity, on condition of improvement, with reservation of a trifling rent. It was made originally of barren land, to whose cultivation such encouragement was necessary, and as it was legally forfeited, for non-performance of the inherent covenants, and yet might be equitably restored, on satisfaction for the breach, we may reasonably conclude that the inventors of our Leases for lives renewable for ever, drew their ideas from this source, on a tenure almost peculiar to this kingdom, as we know they certainly did on possessory bills, a mode of proceeding very usual in Ireland. And hence the modern practitioner might possibly derive some useful principles of direction.

(4) E. G. Fire, and non-enjoyment in consequence, no suspension of the rent; however a defence in an action of waste. *Belfour v. Weston*, 1 Term Rep. and see 2 Stra. 1763. 2 Lord Raym. 1477.

The power of mortgaging among the Romans was more extensive than with us, since they could mortgage even things incorporeal, as debts and actions, whereas the rights to things, termed by the English Law *Choses in Action*, are not transferable, from apprehension that they might become instruments of oppression in the hands of wealth and power.

Modern Laws have a manifest preference, in invalidating unwritten mortgages, whereas at Rome, the legalising parol mortgages, merely supported by three witnesses, gave scope by antedating the conveyance, to iniquitous preference, and variety of fraud. It is true, the guilty deceiver was there liable to the action of *Stellionate* or fraud, and in England loses all benefit of redemption, against the second Mortgagee; but the Registry Acts of this kingdom, and the Edicts of France and Holland, requiring the perfection of mortgages, before public and national officers, form barriers much more effectual,

The Civil Law was inferior to ours, in allowing the Creditor to sell the thing mortgaged by his own authority, after three notices to redeem, without obliging him, as we do, to appeal to some tribunal, which shall judge on the whole circumstances

stances of the case, whether such alienation be conscientious or necessary.

On the Law of Interest we have plainly reason on our side. The Civil Law did not totally prohibit Interest, but only where the borrower had derived no advantage from the loan. But the confined bigotry of Churchmen in the middle ages, rejected interest altogether; and the distinction between Interest and Usury, and the position that money might be hired at a price not exorbitant, like any other commodity, without crime or stain, could find no admission into those regions of darkness. The interested Lombard and the persecuted Jew were the unpopular oracles of truths so plain, and their profane lips were silenced by the whole thunder of the Vatican.

Having discussed the nature and foundation of rights, as considered by each Law, our natural progress is now to Remedies for Wrongs. The necessity of obliging every man to pursue his legal remedies in a certain order, and to fashion them to some reasonable shape, without which disputes would find no issue, and suits wildly conducted, would terminate in endless confusion, have induced all nations to adopt certain forms of actions. These at Rome were long concealed by
the

the Professors of the Law, to enhance their consequence, and aggravate their services, but being at length divulged by Cneius Flavius, formed a valuable part of the advocates library, under the name of *Jus Civile Flavianum*, and raised its promulgator tho' of mean extraction, to the office of *Tribune, Senator & Curule Ædile*. The Romans then had their actions Real, Personal and Mixt, as many and various as with us, and adapted to each particular complaint. Churchmen, our first Jurists, well acquainted with these precedents, transferred an ample stock, into our own *Officina Brevium*, and able Judges from thence struck light, which has illuminated Remedial Justice in modern days. The action of *Assumpsit*, to avoid a tedious length of examples, may afford a conspicuous instance. And thus the *actio quasi publica* was the parent of our *Qui tam* Action.

These Remedies were pursued in various Courts, and before several orders of Judges. The nature of these Judicial tribunals is wrapt in much obscurity, and the confusion is increased by their applying the name of Judges indiscriminately to the presiding power that directed in point of Law, and to the Assessors who judged of the fact. Down even to later times, the parties are always said to appoint their own Judges, and these Dicta seem clearly applicable, not only
to

to the Jury, if I may so call it, but to the Court, a power so strange as to be scarcely reconcileable to our modern notions of wisdom and propriety, nor is it easy to conceive how Judges thus chosen almost at random, should have been endued with competent knowledge; or how this power, seemingly of the wildest nature, should not have been productive of ignorant decision, and subversive of regular precedent. (5) Certain it is, however, from express passages in the Code, that before the time of Justinian, there were fixed and permanent tribunals; certain it is also, that they had distinct Courts of Law and Equity. The Doctrine of Trusts contributed to this distinction with them as much as with us. On the Doctrine of Trusts, their Law was fertile and prolix, and their *Prætor fidei commissarius* easily suggested to Churchmen and Civilians the idea of our modern Chancellor. Whether this distinction of Courts has been either among the ancients or moderns, wise, reasonable, salutary or necessary, has been matter of much celebrated controversy between contending abilities of the first rank, and is a question spread over fields of argument infinitely too spacious for the range of our present course.

(5) This matter will be treated of more at large and explained in a separate treatise.

It

It will not be denied that this division of Judicatures is attended with a certain awkward semblance of contradictory powers, and that had it not been for the narrow decisions of Courts of Law, the Prætorian authority of Chancery probably never would have raised its head; but Chancery must either have assumed its authority, or the Court of Law must have occasionally metamorphosed itself into a Court of Equity, or something not unlike it, a transformation liable to similar objections. The charge of incroachment on the Legal Jurisdictions, was prompted by ignorance, or instigated by party, (6) and the idea that this separate and distinct power is arbitrary, undefined (7) or capricious, (tho' to the surprise of Britain, it was so depicted by an eminent Northern Jurist (8), who undertook to teach the English principles of Equity,) never had foundation, nor could have expected tolerance from enlightened Freedom for a moment; it is a power to supply that which is defective, and controul the harsh and unintentional applications of general rules to particular cases; it is not a power to make a new Law, or dispense

(6) From which imputation of party spirit Lord Coke himself is not free.

(7) It is undefined in one sense only, as the causes that arise before it may be infinite, and indefinite, that is, not reducible to any set form of Legal Action.

(8) Lord Kaimes.

with

with an old one. It cannot be better described than it is by the Roman Jurists, *Juvare, supplere, interpretari, mitigare, jus civile, potest; mutare vel tollere non potest.*

To the Judges of their respective Courts, as well as to the Advocates who attended them, certain Rules were applicable, some of which have been imitated by us, and others neglected. The incapacity of sitting in judgment in the place or province of the Judges nativity is the rule of their Law, as well as of ours, and it may be hoped was better observed by them than by us. The Regulation which commanded him to finish every Criminal Cause in two years, and every Civil one in three, perhaps can only live under the meridian of an Arbitrary Government. But their rules with respect to Advocates seem to have been admirably calculated to preserve the decency and honor of the Bar. Their names were expunged from the Roll of Honor, if they bargained with either contending party, for any part of the matter in contest, or inhumanly refused to defend the accused pauper, at the nomination of the Judge. For railing, and abusive language, they might be fined, suspended, and removed. They went thro' a *real* examination for admission, and might maintain an action for the honourable

H

fruits

fruits of their Labours. How far these regulations correspond to ours, is obvious to every person in the least conversant within the walls of the Forum.

In both Civil and Criminal Causes, the substantial parts were, the Action, Citation, Libel, Contestation of Suit, Answer of the Defendant, the Proofs, the Conclusion, the Sentence, and Execution. Accidental Parts, Contumacy, Exception, Replication, Satisfaction, Transaction.

The form of Trial was that, which has been handed down to us in the Courts Ecclesiastical and in Chancery. The advantage of that power, which can demand the defendant's answer upon oath, is acknowledged by the Suitor in Equity, who finds such assistance refused him by the limited hand of the Common Law. The written examination of witnesses, tho' it discovers not the guilty forehead, nor the trembling hand, possesses that mature and solemn investigation, seldom known to the hurry and confusion of a trial by Jury.

In complicated cases of property therefore, many able men have thought this length of un-hurried examination, infinitely preferable to that
rapid

rapid torrent of captious interrogatories, which often derives credit to the advocate, from the confusion of the evidence, without drawing a single spark from the torch of Truth, or adding the minutest weight to the arm of Justice.

But in Criminal Prosecutions nothing can compensate to the accused for the refusal of liberty to meet the adversary face to face, and to confront the man who aims a deadly dart at his life and at his character; this is one advantage—the other is trial by Jury. Here then the Law of England triumphs; before a Jury of his countrymen and his peers, acquainted by their vicinage with his character, and interested from their equality in his protection; openly accused, and legally defended, the guilty alone can tremble at the incumbent hand of Justice.

The learned Pettingal maintains, that the Centumviri were a Jury, but if his analogy be not fanciful, their utility was at least confined to Civil Cases, for we never hear of them as a bulwark to Liberty, or a shield against oppression. Indeed the whole front of the Roman Criminal Law presents nothing but odious lines of sanguinary horrors, where every step of the Legislature can be traced in blood. The iron crown,

the agonizing wheel, the bed of tortures, present themselves to the abhorrent eye on every side ; their ultimate punishments, savage in their nature, and foreign to their end, (which is example, and not the pain of the individual,) dilaceration by wild beasts, protrusion from the Tarpeian Rock, immersion, crucifixion and scourging to death, are less shocking in narration to our feelings, than the previous engines used to extort confession from the prisoner, and to load with guilt the unfortunate object of Imperial resentment.

The Inquisition, a name now almost consigned to the Regions of Iberia, was the title of a proceeding familiar to the Romans. The long disquisitions in the Digests on the subjects and incidents to the Rack or Question, are too repugnant to humanity, to bear analyzation. The Oath *ex officio*, which in contradiction to every principle, compelled the prisoner arraigned to accuse himself ; and which long roused the just resentment of these realms, (until banished with universal acclamation at the Restoration) took its rise from the same detested font. There is scarcely an abuse of the Criminal Law, which in the last or preceding centuries drew down on its perverters the vengeance of an injured people, that was not suggested

suggested by the despotic Genius of declining Rome.

Yet amidst these severities, we are surpris'd to find glimpses of indulgence, unknown to us, such as delivery of a copy of the indictment or charge to the accused in all cases, the refusal of which, however ratified by time, did always, in my opinion, cast upon our Jurisprudence the complicated stigma of harshness and absurdity (9). Privileges similar to those of the *Habeas Corpus* Act, had early existence at Rome, and indefinite Imprisonment without trial was unknown. In some instances a violent revolution to clemency, even favoured of the Mosaic Rules of Compensation, and refused to punish theft with death, until the days of Justinian.

Here however, upon the whole, is the glory of Britain and of Ireland, and tho' we must recollect that Council, by the Common Law, is de-

(9) This opinion is supported by the author of the Preface to the 2nd edition of the *State Trials*, justly admired by Mr. Hargrave; he ably answers the objection that it would give room for captious exceptions: if they are really captious they ought to be disallowed; if they go to the merits of the cause, why should not the prisoner have the benefit of them?

nied

nied to the culprit, and that it was only in the century before the last that he was allowed to produce a witness ; yet it is our happiness to reflect that the errors of our ancestors are almost matters of historic curiosity, or at most, lights on a distant shore to guide our paths to peace and security. The Trial by Jury, while preserved inviolate, is a palladium which will for ever secure us from a repetition of encroachments. May it be our pride to guard its sacred rights, and preserve its avenues from pollution. And if no other utility was derived from the Study of the Civil Law, but the satisfaction of observing in triumphant contrast the super-eminent attention which ours has paid to the rights of the subject, it would be a recompence to the Philosophic Student, and sincere Lover of his Country.

Int.

Int. Lecture the Third.

OF THE LAW OF NATIONS.

TO treat of the Law of Nations, may on the first view, seem foreign to the duty of a Professor of Civil Law, the affinity of whose Studies might however plead his excuse, in a University, not endowed with a Professorship of the Law of Nature and Nations. But his apology has been already made in a Prælection, whose subject was the Utility of the Study of the Civil Law, marking, among other observations, the surprising degree in which the Law of Rome had interwoven itself with the Law of the World, and become the handmaid to its illustration.

In the execution of this plan, clearness and precision must be my principal objects, before which all attention to studied phrase and brilliant period,
little

little congenial to tracts of the didactic kind, must necessarily bow.

On the very threshold of this structure, a question may probably occur to juvenile enquiry; what means the Law of Nations? how can there be a law between independent states? What is the obligation to it? Where its sanction? Where the penalties of its violation? We have not in Europe or in the world, a general Amphictyonic Council, the Arbiter of States, which may ultimately decide their appeals, and denounce the terrors of universal war, on the children of disobedience? The answer to this apparently formidable objection, is found in the reflection, that the Law of Nations is originally no more than the Law of Nature applied to Nations (1). It has then the sanction, the obligation, the immutability of the Law of Nature; it is properly a Law with all its requisites, characteristics and concomitants. Why then is it distinguished from the Law of Nature? Why rendered the subject of separate consideration, and several discussion?

(1) Vattel therefore very justly entitles his book, *The Law of Nations, or Principles of the Law of Nature applied to the conduct and affairs of Nations and Sovereigns.*

books

In their reply to this latter question, writers are by no means unanimous, and I shall venture with all humility, to propose an opinion, not perfectly coinciding with any I have found in books. The distinction was never made 'till the time of Ulpian, nor are the discriminations of the Roman Jurists on this head accurate or uniform. Justinian defines the Law of Nature to be, *Quod natura omnia animalia docuit*, and the Law of Nations, *Quod naturalis ratio apud omnes homines constituit*, and tho' in the next paragraph the Emperor has with more precision described *Jus Gentium* to be that *Quod omni humano generi commune est, nam usu exigente & humanis necessitatibus, gentes humane jura quædam sibi constituerint*, and instances the case of Captivity founded in the Right of War and contrary to Natural Equality, yet it appears by the context that his general view extended only to those maxims of Equity, which being founded in the Nature of things, are universally applicable to individuals of different countries, and not to the Laws mutually obligatory upon integral National Communities.

But, if the ancients distinguished these Laws imperfectly, the moderns did not, till of late, distinguish them at all. Hobbes, whose abilities at least will not be denied, treats of the *Jus Gen-*

tium merely as part of the Law of Nature, and the great Puffendorff has no where granted it a separate discussion. Their method was founded in an opinion condemned as false by more recent writers, that the maxims of the Law of Nature applied to States, were the same with its regulations, applied to persons, expressly averring that the Law of Nature when applied to Nations, can suffer no necessary change; that the duties of States and Individuals are the same. Barbeyrack allows a variance, yet condemns division of the subjects. It was reserved for the Baron de Wolfius, of Hall, a German Philosopher, (whose merits far exceed his fame, and whose voluminous works (tho' tinged with the laborious prolixity characteristic of his nation) are replete with sound Learning, and the offspring of profound meditation) it was, I say, his glory clearly to establish the boundaries of these different codes. He first insisted, that the diversity which takes place in the application of the Law of Nature to States and Individuals, formed such entirely different Codes of Duties and Rights, as made it utterly improper to blend them in the same treatise or apply to them similar maxims. His disciple Vattel, (whose compendious work, by its clear conciseness, is peculiarly adapted to common use) adopts the doctrine, and acknowledges the matter,

ter; yet deviates in the mode of establishing the foundations of National Jurisprudence, deducing the idea from Natural Liberty, and Common Interest, while Wolfius has recourse to an imaginary Universal Republic.

Coinciding with them on the propriety of distinct consideration, I must, with all humility, beg leave to differ, as to the reasons on which it is founded.

The Law of Nature, say they, is rightly in common parlance confined to Individuals, their rights and obligations, because the decrees of Natural Jurisprudence between State and State frequently vary from its injunctions between Man and Man, since a particular rule, perfectly just when applied to one subject, viz. an Individual, may be totally improper in its application to a Nation, a subject of a very different nature.

If these foreign Jurists meant to speak of Man in Civil Society, it is true; but if of Man in a state of Nature, which is necessary to their position, I find myself obliged to agree with our countryman Hobbes, that the Law of Nature, when applied to Nations, can suffer no necessary

I 2

change.

change. I speak here of the Necessary Law of Nations, for as to the Positive, that is not the Law of Nature, but the Law of Compact expressed or implied, and certainly may vary from the Law of Nature. Nor do I recollect an instance adduced by Wolfius or Vattell, of such diversity. Both of them distinguish the imperfect from the perfect Rights of Nations, and determine the incompetency of one independent State to prescribe to another; the criminality of communities, their violations of the Law of Heaven implanted in their hearts, are cognizable by no foreign tribunal, and liable to no exterior sanction, while injurious merely to themselves, and innoxious to their neighbours. And even tho' pernicious to surrounding powers, if merely offences against National Equity, merely refusals to attend to imperfect rights, they are not subjects of resentment, restitution, or punishment. Denial of the offices of humanity, of corn, of stores, of supplies, calls not for vengeance on the uncomplying country, the sole judge of its propriety, and arbiter of its necessity.

But do not all these principles apply to men in their private capacity—do not imperfect rights as well as perfect, appertain to individuals? Has any man in a state of nature, authority to enforce

force his imperfect rights by violence, or to controul the actions of another in no manner affecting his own? No foreign nation can juſtly interfere in the plans of Municipal System, nor Individual ſtranger in the regulation of Patriarchal Dominion.

Again, they have taken much pains to explain the nature of National falſehood, as diſcriminated from hostile deception, and to ſubdistinguish juſtifiable deception from intolerable fraud.

The King whoſe Secretary detected in perfidious correſpondence with the Foe, was compelled to write diſpatches, enſnaring the enemy to his ruin, has reaped applauſe—while the ſhip which by holding out ſignals of diſtreſs, inveigled the foe to his capture, has been juſtly reprobated, as damping that charity which is ſacred to the intereſts of mankind.

The caſes cannot happen in Civil Society, but ſurely in Natural, if hoſtilities commenced between man and man, the ſame rules would qualify juſtifiable ſtratagem, and condemn unauthorized deception.

THESE

These then are not the reasons of classing the Law of Nations as a particular Science; the real cause in my judgment is, that *numberless cases* arise, *peculiar* to Nations and not incident to individuals, and therefore making a separate science, and requiring a several discussion, not that the *same* cases applied to both, are regulated or decided in a different manner; and the necessity of distinction depends on the importance and variety of situations, confined and peculiar to great communities alone, and also upon the existence of a voluntary or positive Law among Nations.

Having now shewn the grounds on which late writers found the distinction between the Law of Nature and Nations, and those on which it appears to me to rest; method would lead me in regular order to delineate the various branches and divisions of this Law, and give a general and distinct chart of the immense dominions subject to its sway. But let me pause a moment, to obviate an objection which probably has, by this time, arrested the mind of the auditor, especially as in so doing, the advantage of example may rouse the attention of the disciple, and demonstrate the utility of the science. The objection is, to the magnified eulogiums of theorists on its importance

importance, and their declamations on its difficulty.

If it be merely the Law of Nature, it may be said, that Law which Reason and Providence have implanted in the human mind, the eye of conscience will instantly discern the rays of Justice, in whatever direction they are emitted. Behold, the common topic of satire and ridicule, with the ignorant and unthinking, on those whose peculiar province it is to develope truth in her sanctuary. No! the Majesty of Justice often sits enthroned in a secret temple, accessible to few votaries. Reason is given to correct first impressions, but does not proffer the instant discovery of involved and perplexed propositions.

In the subject of our present consideration, nothing can more fully shew the inherent difficulties, than the monstrous absurdities of many even of its most illustrious professors. Can there be a more extravagant idea to any man acquainted with the true foundations of government and succession, than a testamentary right in Princes to bequeath the Sceptre, however Elizabeth or Peter may have exercised the power *de facto*; yet it has been justified and supported by the ablest writers, and amongst others, by that very Wolfius
of

of whom we have spoken. Can we conceive a more horrible principle, than the contradictory of that Law of War, which prohibits poisoned weapons, the infecting of springs, murder of an enemy by poison or assassination, the unnecessary multiplication of the evils of war, or the adoption of acts destructive of human society. We might have hoped that the authority of Grotius, the oracle of sound policy, and common sense, would for ever have silenced the impious tongue that could propose such horrors. We might have hoped, that the glory ascribed by Tacitus to the Romans, *Non fraude, neque occultis, sed palam & armatum, populum Romanum hostes suos ulcisci*, would have been envied by all posterity. Yet such doctrines are not altogether strangers to the celebrated Philosopher of Hall; and the Representatives of an enlightened nation, (2) at a very late period indeed, endured their mention, without indignation or abhorrence.

The disputes about *Mare clausum & liberum*, engrossed, in the last century, the attention of all Europe. They were occasioned by the claim of the English to the dominion of the neighbouring seas even as far as the opposite coasts, a claim

(2) The French, whose rulers at one time took into consideration the propriety of employing assassins.

which

which could have been founded only in treaty, and as it rested merely on use, was supported solely by power; the licence of Britain was the sole key to the navigation of those seas; the claim was extravagant as it was haughty; the sea, at least out of cannon shot of the coasts, is common to all: Yet it was supported by the learned Selden, and required at that time confutation from the able pens of Grotius and Bynkershouke.

These are questions of obvious solution; but it would be easy to point out many others of more difficulty, on which the decisions of this Law might teach the Student to tread more warily on similar grounds, where youth is sometimes tempted to plant a hasty and presumptuous step.

No question has been more agitated than the right of searching neutral ships trading with the enemy. All Europe linked in the armed neutrality, on a late occasion decreed against its exercise. They opposed power to the established Law of Nature and Nations. Every Belligerent State is warranted in stopping the materials of war in their passage to the enemy, and the only existing controversy in the Court of Reason is, whether compensation should be made for the goods detained,

or their seizure receive the stamp of general approbation.

May I be permitted, without appearing tedious to mention an instance perhaps more familiar to the scholastic mind, the conduct of the Romans at the Caudine Fauces, because tho' usually condemned by the hasty observer, it has been differently adjudged by many learned writers.

The General, say they, covenanted without orders, and without power. The State was not bound to ratify his promise. The Samnites never insisted that it was. No! they only urged, that the army should be put again in the situation in which they stood when surrounded. The Roman General had promised his utmost exertions to obtain ratification from the supreme power. The Samnites accepted the chance of his succeeding, and released the prey, to which their title could never be restored; all that the State was bound to do, was to give up the unsuccessful promisers to the foe, an offer made, and peremptorily rejected. Such is the language of writers on Public Law, and such the nature of all Subaltern Powers, according to them. See Gro-
tius

tius on the Samnite and Numantine Treaties, *de Jure B & P.* Lib. 2. ch. 15.

The observation is of the more consequence, because those positions bear strongly on a question, which has been not a little agitated in the country wherein we dwell (3). I do not here give my opinion; the instance is adduced to caution the dogmatical but unlearned decider on similar questions, of the necessity of studying this Law.

The limits of the rights of the besieged to destroy the suburbs of the town besieged, or of the besiegers to ruin its sumptuous edifices—the treatment of spies(4)—the case of subjects taken in arms and particularly among enemies who surrender on terms—the power of the victor over the property of the vanquished, occurring

(3) That respecting the Articles of Limerick.

(4) A competent knowledge of the Law of Nations, would have prevented many a controversy in our own times such as on the fate of Major Andre—on the right of the French to execute their threat of firing red hot balls at sea, (forbidden by express treaty in the reign of Lewis XIV)—on subjects taken in the late incursion into Wales being included in the terms granted to enemies—on Sir Sidney Smith's conduct, said by the French to be against the Law of Nations, &c.

in every page of recorded time, demonstrate the necessity of this knowledge to the writer, the lover and the student of history.

I shall detain your attention by barely mentioning two instances more, of a Nature perhaps too delicate to be at present discussed in this place. What floods of absurd argument have been poured forth on the questions, how far one State has a right to interfere in the Government of another, or to change its own constitution. Infinite are the shades and gradations, the exceptions and qualifications, which attend such positions and enquiries ; yet mankind seem to have forgot the adage, that error lies in Generals, and to have supposed that no positions are true, but those that are universal. The principles which ought to guide and determine us, in such disquisitions, have been clearly, and I think justly laid down, by writers on the Law of Nations, an attentive and honest perusal of whose works might not only have silenced much of the wordy war on these subjects, but what is of infinitely more consequence, have saved much human blood.

To diminish therefore these difficulties which occur to unenlightened reason, to mitigate the horrors

horrors of war, and preserve the blessings of peace, their Laws have been reduced by Philosophers to a system, whose general method, order and partition it is now my business briefly to explain.

They first distinguish the internal Law of Conscience, which is usually called the *Necessary* and *Natural* Law of Nations, and which is always obligatory upon a nation with respect to its own duty, from the *positive* Law of Nations. This positive Law consists not only of that which has arisen from custom and convention, and therefore is or may be confined to particular States, and depends upon their arbitrary volition; but also that external Law, which dictates what every nation may require of every other, which Law is independent of their mere volition, and yet being founded in the will as governed by reason, is usually called the voluntary Law of Nations. They divide therefore the Law of Nations, into the Natural, or internal Law of Conscience, and the Positive; the Positive again into the Voluntary or external Law and the arbitrary, which consists of the Conventional and the Customary.

Example will illustrate. War founded on Justice is (according to the Law of Nature which constitutes the necessary Law of Nations) a just
method

method of acquisition. War founded on injustice is not. But by the Voluntary Law, every war publicly declared with all due forms is *considered* as just on both sides, and accordingly amongst nations, conquest is always allowed as lawful title, unless the consequence of war unsolemn, as well as unjust (5).

The Voluntary Law of which we have here spoken, must be carefully distinguished from the Conventional and the Customary; it is *Universal* and *founded in Nature*, as well as the Necessary, and therefore is plainly distinguished from that Law which arises from compact expressed or implied. It must also be distinguished from the Necessary Law, because it is the external, as that is the internal Law of Nations. The necessary is a Sacred Law, obligatory in conscience, on all nations, in the regulation of their internal conduct. The other is a rule which their welfare and common safety obliges them to follow in mu-

(5) This does not contradict my opinion that the Law of Nature applied to Nations suffers no change, it is not here applied; but a positive Law founded on implied compact (*that compact made by reason indeed, but no part of the immediate Law of Nature*) is substituted, and it is in this sense that Grotius says, *Jure gentium vetari multa solent, quæ Jus Naturæ permittit* and the converse.

tual

tual intercourse. The thing therefore forbidden by the Natural may be tolerated by the Voluntary, because its punishment may be inconsistent with general liberty and reciprocal independence ; but we must not thence deduce its rectitude or justice. The general principles of National Jurisprudence oblige us often to leave the offending Nation, to the chastisement of conscience and the dispensations of Providence. That people is forbidden by the Natural Law of Nations to do wrong, but punishment is wrested from our hands by the Voluntary. The necessary Law then immediately proceeds from Nature, the Voluntary mediately, nature recommending a deviation from her ordinary principles, on account of the relative state of Nations, and their mutual advantage.

Such are the distinctions which writers have thought necessary in treating of this Law ; the limits of a Prælection will not suffer more minute detail. Still it may be asked (it is the last objection I shall consider in this exhortation to the study of a most useful and noble Science) to what purpose these theories and these systems ? In practice behold them neglected, despised by Statesmen, condemned by Politicians. Let the objector recollect, that he makes practice the criterion of right

right, or denies its distinction from wrong: is there then no difference between right and wrong, between truth and falsehood, between justice and iniquity? Can the *Æthereal* form of *Heavenly* Virtue be stained by the pollution of *Man*, or its immutable essence change with the fickle villainy of the human heart? Forbid it *Heaven*! such opinions can never enter these walls: within this Sanctuary refutation were idle. On the foundations of obligation we may differ, on its existence every heart will unite.

Let the disciples of *Machiavel* despise the Law of Nature. Let their doctrines boast a little temporary success or individual elevation. Providence does not descend to our minute span. Political villainy may prosper for a single life, or mould the fortunes of a particular man; but where is the nation which has prospered by despising the Laws of Heaven. The life of nations is the period for philosophic observation. Their duration, and their felicity, the criterions to distinguish sound policy from tricking iniquity; to the tribunal of history I appeal, and time and fate shall be the judges. Who shall say for how many centuries false policy and mistaken cunning, in their day admired and called wisdom, have been generating the storm which now agitates

tates Europe, or how remote the fathers, whose sins are now visited upon their children.

But great is our error, if we suppose that the Law of Nations has no influence on the wicked; it checks where it does not guide. No Prince, no Potentate dare refuse an apparent allegiance to its sway. In the imagination of the Poet alone has existed the Bravo who announces, all this I do, because I can. The manifestoes of Belligerent powers are so many acknowledgments of its dominion. Nor are they merely obeisances to the Star of Virtue; the disposition of nations tends to punish the Violators of their Common Law; that disposition will often control the intrigues of Courts, and the confederate artifice of mutually corrupting States. Nor are Ministers always so wicked as to require impelling force from the public will. It were a cruel sentence on Governors, which decreed them necessarily flagitious, or supposed the infusion of authority a poison to all the bland materials of the human heart. Many have been the salutary rulers, who were sons of rectitude, not servants of fear, and the doctrine that power and honesty are incompatible, checks every seed of confidence, and with eternal languor blasts the thus uncherished propensity to good, which the Deity placed in the rudiments of our Constitution.

L

Let

Let us watch the progress of just and unjust wars. Some of us in the course of no long life have had opportunities. The Enthusiasm, the Spirit, the united Force of the nation in the former is irresistible. The voice of faction is dumb, the contest for power ceases, murmur scarce whispers in her dark cave, opposition is impotent. In the latter with languid and desponding effort, the nation acts with but half its strength, while the other moiety in the violent ebb of popular opinion revolves back on the issuing tide. Let us admire the truth, and acknowledge there is a Law in our hearts, resistless, and uncontrollable.

Is the knowledge of Justice useless, because men will not always be perfectly just. Men tho' not perfectly just, will be less unjust, knowing this Law; men will do wrong, but he would be a strange logician who inferred, there is therefore no use in knowing the difference between right and wrong. What is the use of all Moral Education? Men are more virtuous by being taught what is right, nor is it possible that the human mind can be long exposed to the luminary of reason, without being whitened by its rays; while then the unalterable bounds of right and wrong shall exist; until the adamantine walls

walls which separate the infernal regions of Fraud and Iniquity from the blissful seats of Light and Heaven shall be pulled down; so long as Chaos and Confusion dwell on the borders of Hell and Hellish deeds; while National treachery shall destroy reciprocal confidence, and the fangs of national injustice, be the seeds of armed Myriads against itself; while there be any Virtue, while there be any Praise, so long shall the Law of Nations tower in the rank of dignified Science, and its disciples meet their reward.

RIGHTS of PERSONS.

Prefatory Remark.

These Lectures proceed at once to the rights and duties of persons, in their private relations, omitting those which arose at Rome, from the public relations of Magistrates and People, the latter being well known to the theoretic scholar, and to the practicing lawyer now of little or no concern, except to warn him of the ill use formerly made of them, to support ship money, dispensing power, &c.

LECTURES

ON THE

CIVIL LAW.

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

Lecture the First.

HUSBAND AND WIFE.

THOSE branches of the Civil Law to which modern institutions bear no analogy, and which therefore only tend to satisfy curiosity, or illustrate history, may be here treated in a more slight and general manner. Such for example are Servitude, Paternal Power and Adoption; but where the rules of the Roman Code have given rise either directly or by analogy to the regulations of
our

our laws, or where they form the law and practice either of our Maritime or Ecclesiastical Courts, I must beg leave to unfold them more minutely and in detail. This is peculiarly the case on the subject to which we now proceed, the relation between husband and wife, the contract of marriage; in many instances the law of marriage both in our Temporal and Ecclesiastical Courts is derived from the Roman Institutions; indeed, in most, except where the precepts of our holy religion have interfered, and forbid the admission of rules contrary to its purity. The subject is the more important to the Civilian, because it constitutes one grand division of those causes which come under the cognizance of the Spiritual Courts, which are (except those which are merely *pro salute animæ*) divided into pecuniary, testamentary and matrimonial (1).

Marriage is considered in various lights by different laws. The Roman had respect principally to its civil effects, as it produced in the husband and wife a mutual participation of benefits

(1) It may surprise the peruser of the Institutes of Justinian to find so important a subject there so slightly touched upon; the reason is this, the Emperor in the Institutes merely introduces it collaterally as one of the foundations of paternal power.

and

and right; it was therefore defined, *omnis vitæ consortium, humani & Divini juris communicatio*. I do not mean that the Romans omitted all religious rites on the perfection of this contract, but their laws viewed it merely as a civil covenant, however the Gods might preside over its ratification. Those rites were not any part of its essence: it was good without them. The Canonists consider it in a religious light, and define it a Sacrament peculiar to the Laity, by which a man and woman are joined together according to the precepts of the Church. Among Protestants it is considered, partly as a holy union of divine institution, partly as a civil contract; in the latter view alone it is regarded by the Temporal Courts; its sacred bonds being left entirely to the guardianship of the Spiritual Tribunals.

I shall first consider how marriages were created at Rome; secondly, the effects of this relation; thirdly, how they were dissolved; marking, as we proceed, how the different views of it above mentioned have occasioned the Canon and our Law to differ from theirs.

With respect to the first head, how marriages were contracted—in this as in all other contracts, the parties must, by the Roman Law, as by ours,

First, be willing to contract.

Secondly, able to contract.

M

Thirdly,

Thirdly, must actually contract.

Fourthly, to *produce certain legal effects*, the marriage must have been actually celebrated with particular rites and ceremonies, which however were not part of its essence, nor requisite to make the contract complete, as they are with us.

First, Willing—It is evident that free consent is necessary to constitute a valid marriage; it would be flagrantly absurd to allow the brutal ravisher to form by acts of violence an indissoluble union. The maxim therefore of the Roman law as well as of ours is, *Consensus non concubitus facit nuptias*; if then, error, fear or force intervened, the marriage was void, because consent, which is essential to it, was wanting. But as it would be much too general a position, to say, that all error vitiated a marriage; it may be useful by one or two examples to point out what manner of error was fatal. An error in the person vitiated the marriage, *e. g.* if we suppose one of the parties drawn by some disguise or deception into a contract with a person they did not intend, and whom they mistook for another; an error in an essential quality was fatal, as *e. g.* with respect

reſpect to impotency (2) or affinity : an error in an accidental quality was not ; for inſtance, in fortune or temper (3) : for weak indeed would be the nuptial tye if liable to be broken on account of imperfections diſcovered after marriage, and miſtakes with reſpect to fortune, if not occaſioned by fraud, deſerve no pity—if attended with fraudulent circumſtances, can only furniſh a ground for pecuniary compenſation.

On this head of error the laws of theſe countries do not differ from thoſe of ancient Rome. (4) Of marriages diſputed on account of alledged error in the perſon, (tho' ſuch an event, however frequently made an inſtrument of the drama, ſel-

(2) This objection is conſidered, by Mr. J. Blackſtone, under the head of Diſabilities. The reader here will obſerve, that tho' the general claſſification correſponds with that of the learned Profeſſor, there is no ſimilitude in the arrangement or ſucceſſive order of the inferior points. *E. g.* Again, idiotiſm, claſſed by him as a diſability, is conſidered by the Civil Law under want of will, and the diſtinction of diſabilities into thoſe attended or not attended with turpitude, is not uſed by Blackſtone.

(3) The French in their paſſion for novelties, have made temper a cauſe of divorce.

(4) To the errors in eſſentials above mentioned, the Moſaic Law added an error in reſpect to virginity.

dom occurs in real life), an instance has occurred within my own experience; errors in essential qualities, even if we can suppose the parties willing, operate as disabilities, and make the marriage voidable; and errors in accidental affect not its validity.

An error occasioned and produced in one party, by the other, in order to break the marriage, shall not avail the deceiver, such as misnaming himself or herself, unless where the error respects some disability (as consanguinity) or occasions the omission of some requisite expressly insisted on by the positive law, for example, that of the person celebrating the marriage being a clergyman in holy orders; but when the Spiritual Courts in England were allowed to enforce contracts *in presenti*, which they could until the marriage act, (and no such act having passed (5) here, are still allowed to do in this country, where there is no subsequent marriage with consummation) it would seem that if the marriage had been celebrated by a layman disguised as a clergyman, the Judge should have decreed a celebration *in facie Ecclesiæ*, because tho' not properly a marriage, it was a contract *de presenti*.

(5) This difference between the Laws of the two countries is worthy of observation.

The

The consent must be given without fear, but under the name of fear is not comprehended filial respect and reverence, inducing the child to pay attention to the wishes of the parents, if on their parts there be no force, personal violence or menaces: if it be a fear, according to the language of the Civil Law, *a quo absunt verbera, vincula, minæ*. It must not be forced, hence marriages celebrated by force are void, and by the Civil Law the consent of a party forcibly carried away from the family and married, whether given precedently or subsequently did not confirm the marriage; by our laws, a precedent consent, (in such a case) in some instances, does not confirm the marriage; a subsequent in scarce any; but this disability in the persons carried away, to ratify such forcible marriage by their consent, depends on particular statutes, and is confined to the cases mentioned and described in those statutes (6). Prostitutes by the Roman law were not entitled to this protection from force; but our laws regarding the rights of humanity, as well as the

(6) The principal of these statutes are, in Ireland,

31 Hen. 6. Ch. 9.

3 Hen. 7. Ch. 2.

10 Car. 1. Ch. 17.

6 Anne, Ch. 16.

19 Geo. 2. Ch. 13.

public

public order and peace, have given them in this respect the same immunities with other women.

Under the head of marriages void for want of consent of parties, may be included those of Idiots and Lunatics, who having no free will are incapable of consent, and were therefore by the Civil Law incapable of contracting matrimony. By the old Common Law of England, Idiots and Lunatics were absurdly permitted to marry, but by the English statute, 15 Geo. 2. Ch. 30. the marriage of a Lunatick found to be so by virtue of a commission, or whose person and estate are by act of parliament entrusted to others, *is in that kingdom* declared to be null and void (7); and here, the marriage of a Lunatick if not proved to be in a lucid interval would be determined to be void.

Secondly, Able—Now let us suppose the parties willing, we proceed to the causes which may disable them from contracting; these were divided by the Civil Law into such as were attended with turpitude, and such as were not. Under the former class, of those free from turpitude, they

(7) This act is sometimes called the Bradford act, as said to have been introduced by Mr. Pulteney to prevent Lord Bradford, to whom he was next in remainder, from marrying.

reckoned

reckoned infancy—want of proper consent—alienage. Under the latter such causes as rendered the marriage incestuous, indecorous, or noxious. We shall consider them in this order.

1st. Infancy—By infants in the Civil and Ecclesiastical Laws (in relation to marriages) are meant children under the age of seven (8). Such could not even contract espousals (9); between the age of seven and puberty, which by the Civil Law as by ours was 14 years in the man, 12 in the woman, they might contract espousals, *i. e.* make contracts *de futuro*, or mutual promises of future marriage, but not marriage contracts *de presenti*, or by words of the present tense.

At the age of puberty they might agree or disagree to the contract by marrying or refusing to marry; so they might if one only of the parties were under the age of puberty, on that party's arriving at such age. The Canon Law respected habit, not years, in determining who were of

(8) With respect to other acts and powers, infancy had other meanings, lengths and periods.

(9) The marriages of Princes were excepted for reasons of state. Swinburne, in his Travels, mentions having seen at Palermo, two young ladies of eight years of age, who had been even then espoused or betrothed, appearing at balls with their future husbands.

the

the age of puberty, which therefore according to the Canonists must differ in different persons. If persons under the age of puberty married *de facto* at Rome, the wife was considered only as a spouse, the husband could not sue for her dower, if repudiated, she had not the *actio rei uxoriae*, nor could she upon this event recover a legacy, bequeathed to her, to be paid at the time of marriage.

Our Law here differs from the Civil. A contract *de futuro* is of no force, if both the parties are under the age of 21 years (10); if one only a minor, is voidable at the election of that minor; it differs again in this, that with us marriages *de facto* with persons under the age of puberty, are considered as more than spousals, as actual marriages, for tho' either party on coming to the age of puberty may disagree to the marriage, yet if there be no such disagreement, no second celebration of the nuptials is required; if indeed one of the parties disagrees, the marriage is void without any sentence of divorce (11). Such cases in latter times have rarely happened, but formerly questions have arisen, whether these marriages,

(10) *Holt v. Ward. Strange.*

(11) *Godolphin* p. 479.

notwithstanding

notwithstanding disagreement should not be considered as valid with respect to third persons (12).

2nd. Disability—Want of consent of parents or guardians. No consent was wanting but that of the parties themselves by the Canon and our Common Law, for tho' by the feudal system the want of consent of the King or Lord, subjected the party to forfeitures, yet that did not invalidate the marriage. In the Civil Law the consent of the father was indispensably necessary to the validity of the marriage, until the child was emancipated; hence great difficulties arose when the father was insane, in captivity, &c. till by later regulations the magistrate had a power in such cases to dispense with the necessity of consent (13). In some cases, for want of
a father

(12) *Vide* Leigh and Hanmer, Leonard 53. The case was thus: a bond was given by Leigh, conditioned that his son should marry Sir Thomas Hanmer's daughter; they intermarried, the son being 12, the daughter 9; Leigh's son at 14, his age of puberty, disagreed to the marriage. An action was brought on the bond; adjudged that its condition was fulfilled, and that the marriage under puberty, tho' the parties had a power of afterwards disagreeing, was thus to be considered a good marriage as to third persons.

(13) The necessity of parental consent is agreeable to reason, otherwise filial irreverence is encouraged, and

N

rash

a father, the consent of mothers or guardians was required. If consent was unreasonably refused by the father, there was no remedy; if by the mother or guardian, the magistrate had a power of interference, and might allow the marriage. In Holland the consent of parents or guardians is necessary to 25. In France until 30. The Legislature of England in later times has adopted the same policy, and by various statutes has made the consent of parents or guardians until the parties are 21, an indispensable condition to a good marriage. Hence in England the age of 21, is become the full and perfect age,

rash and imprudent connections follow, attended with misery both to parent and child. It is also agreeable to the Divine Law, which makes marriages without such consent voidable. Isaac, Jacob, Sampson, Exod. 22. v. 17. Tho' a man seduced a maid, the father might refuse her to him, ergo a fortiori &c.

Deut. 7. v. 3. The Israelites were forbidden to give their children in marriage to the children of Canaan.

1. Corinth. 7th Ch. St. Paul speaks of persons giving or refusing their children in marriage.

Yet the Council of Trent severely condemned those who hold that marriage without consent was voidable, and many writers on the Canon Law have maintained, that such consent, tho' decorous, is not essential to the *ratification of the marriage by that Law.*

in

in respect to marriage, as it always was with respect to many other acts. Of these English statutes, the principal is usually known by the name of the Marriage Act, 26 Geo. 2. which never was enacted in Ireland; but certain acts have passed here, particularly 9 G. 2. Ch. 11. and 23. G. 2. Ch. 10. to invalidate by suit in the Ecclesiastical Court, (to be commenced within a year) the marriages of persons *having estates to a certain amount* therein specified, who marry under 21, without consent of parents or guardians. The Irish Canons require their consent in all cases where the parties are under the age of 21, and at any age if they are married by licence (14), except in case of widowhood.

3d. Disability—

(14) The propriety of the English Marriage Act has been a subject of great controversy: against it was urged the decrease of population and licentiousness which it would occasion. It was answered, that parents were not apt to refuse their consent to reasonable matches, but must wish to see their children settled; that any perverse opposition from the parent could only retard the marriage until 21, no great age for entering into that union, and that hasty marriages do not tend to make the people happy, or the nation prosperous, or add to the felicity of either children or parents.

This Act is supposed not to extend to Scotland, but Lord Mansfield expressed great doubts upon that point.

3d. Disability—The parties not being Roman Citizens. This followed from the Roman definition of marriage, and the light in which they considered it, for how could others participate all rights divine and human, when none but Roman Citizens were entitled to those full and complete privileges. The participation of divine rights was of great consequence to a Roman wife, *e. g.* her being admitted to the sacrifices offered by the husband, because without such participation there were many civil rights to which she was not entitled. Marriage with them meant the union of persons entitled to every right that human nature is capable of; hence the union between Citizens was called *Nuptiæ* or *Connubium*;—with other free persons *Matrimonium*;—and between slaves themselves—*Contubernium*. Vid. Heineccius.

Having now gone through the disabilities, which are merely temporal, or not attended with turpitude, we proceed to such as are, or at least have been so accounted. Marriages forbidden

It is said to be rendered totally nugatory by having the banns called in a parish where a party has resided a certain time for the purpose, but where notwithstanding such residence the banns may be called without the knowledge of any parties concerned to prevent it; for this trick is said to be a security from the act.

The Royal Marriage Act, 1772, is also sometimes emphatically called the Marriage Act,

by

by the Civil Law, on account of the latter, are classed under,

1st. Incestuous.

2nd. Indecorous.

3d. Noxious.

Incestuous.—In order to understand how far the disability arising from consanguinity or affinity has been extended by different Laws, we must trace out their respective methods of computing the degrees (15) of kindred among collaterals (16). The Civil Law reckons upwards (17) from either of the persons related; to the common stock, and then downwards again to the other; reckoning a degree from each person to the next both ascending and descending.

The Canon Law (18) begins at the nearest common ancestor, and counts downward, and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor

(15) *Gradus est Distantia Cognatorum.*

(16) It is evident the degrees of kindred in the right line, must by all laws be reckoned alike,—i.e. as many degrees as there are generations.

(17) This was the Jewish mode of computing, and is the fair and natural one says Bacon. ab. 3 vol. p. 572.

(18) The rule of the Canon Law is thus expressed :

Linea transversa æqualis.

In

cestor; that is, the degree in which they are related to each other. E. G. cousin germans, are by the Civil Law in the 4th degree to each other; by the Canon Law and by ours in the second degree. This being premised, the rules of the Civil Law are easily understood, and may be reduced to *two*.

First, Marriages between persons in the direct Line, whether ascending or descending, are prohibited *ad infinitum*.

Note.—*This rule is common to the three Laws.*

Secondly, In the oblique equal line, (*i. e.* if both persons are equidistant from the common stock,) the second degree is within the prohibition, the fourth not. In the oblique unequal line (*i. e.* if one be more remote from the common stock than the other,) all degrees beyond the third are legitimate degrees, unless one person be *in loco parentis* to the other (19). There are no degrees of affinity in propriety of speech, be-

In Quoto Gradu unusquisque distat a Stipite; eodem inter se distant.

Linea Transversa inæqualis,

In Quoto Gradu Remotior distat a Stipite, eodem distant inter se.

(19) By persons *in loco parentis* to us, the Roman Law meant persons nearer the common stock than we are.

cause

cause no generations of blood, but by analogy a rule is applied to them, viz. In whatever degree any person is related to me by blood, in the same degree is the consort of that person related to me by affinity (20).

The Canonists eager to augment the restraints upon marriage, in order to increase the necessity of dispensations, were not pleased with these rules, or with the Civilians method of computing degrees. They therefore adopted the method of computation mentioned above, which brought all persons within nearer degrees of kindred than before, and extended their prohibitions to the fourth degree, in the equal collateral line, and even further in the unequal. Not content with these alterations, they invented new restraints, arising from spiritual relationship, *i. e.* from having the same godfathers or godmothers, and extended their prohibitions to the seventh degree of this relation, until the Council of Trent re-

(20) Yet some exceptions; by these rules Cousin Germans might marry, yet often forbidden by the Emperors before Justinian. A man might marry his niece not his aunt. Yet the niece was prohibited after the time of Constantine, I suppose for being within the Levitical Degrees.

stricted

stricted the prohibitions of marriage, arising from baptism, to the second degree.

Altho' in these countries the method of the Canonists in computing degrees is adopted with respect to real estates, and that of the Civilians as to personal, yet neither are applied to the disabilities of marriage. A statute of Henry VIII. which is in Ireland, 33. Cap. 2. has ordained, that no degree of kindred shall be a prohibition to marry, except such as is made prohibitory by God's express law, or such as comes within the same reason. The degrees of kindred therefore, to which we are to look, to know whether marriage be prohibited on account of consanguinity or affinity are the Levitical degrees. The inability to marry persons who are *in loco parentum* does not exist with us (21).

Marriages were prohibited by the Civil Law as indecorous, 1st between senators and emancipated slaves, or other persons of mean condition. 2d, Between a man, and a woman who was an actress, a prostitute, an adultress, or who had been convicted of heinous crimes. 3d, Between

(22) A man had married his great uncle's wife, a libel was exhibited against him to annul the marriage. Prohibition was obtained, for it is within the Levitical Degrees; yet she was to him *loco parentis*.

Dr. Harrison v. Burwell, Vaughan.
parties

parties who had committed adultery together (21).
4th, Between the ravisher and the ravished. The first prohibition as to Senators, however, was taken away by Justinian. The second and third are unknown in the Canon Law, or in our Common Law.

Noxious—First, Marriages were prohibited among the Romans as noxious, between Christians and Jews. To this, our Laws forbidding the intermarriages of Protestants and Papists may bear some comparison as to their policy.

Secondly, Between guardians or their sons, and their female wards, before they have rendered an account, and between provincial Governors, or other public Officers in the provinces, and provincial women (22).

Thirdly, The marriages of the clergy, or others who had made a vow of chastity.

Fourthly, Between persons who, or one of whom were married already to some other, still living.

By the Civil Law Poligamy is expressly forbidden. In these countries a former marriage not only invalidates a latter, but subjects the party to

(21) This tho' often spoken of in the House of Lords, never has been enacted in these realms.

(22) Compare with this policy, the antient laws here, forbidding marriages between the Irish and English.

the penalties of felony, unless there has been a precedent separation, a *mensa & thoro*, which, tho' it does not confirm the second marriage, prevents the felony. At Rome frequent attempts were made to abolish the Laws against Polygamy, but without success. Julius Cæsar entertained such a design, but did not carry it into execution. Valentinian I. wishing himself to take a second wife, allowed the practice tho' it had ceased to be common. Justinian forbid it expressly among the Romans, and Theodosius, Arcadius and Honorius extended the prohibition to the Jews (23). Among modern civilized nations, Polygamy has scarce ever been legalized, not even in Muscovy; Charlemagne, at that early period, punished it as adultery. It is remarkable, that the Mahometans, at present, tho' they practice it themselves, are said to forbid it to the Jews (24).

It

(23) Among the antient nations, the Persians, Athenians, Parthians, Thracians practised Polygamy.

(24) This practice has been defended by appealing to the practice of the Patriarchs, particularly Lamech, and of the whole Jewish nation. But, says St. Austin, what is that to us; we are forbidden by the positive revealed Law, they were not. Besides, others maintain that Lamech was severely reproached by his conscience for this act, and if it was indulged to the Jews at all, it was rather

It is not wrong, say the polygamists, because it is not contrary to the end of marriage, which is encreasing the species. This is not consonant to experience, for it is not found to encrease population. Turkey is an instance (25).

It has also been defended as necessary in hot climates. The Roman law giver did not think so, for he enacted these prohibitions for the meridian of Modern Turkey. A defence of the practice has been lately attempted by a Doctor Madan, whose work has not even the merit of novelty; the same notions having been broached long before by Lyserus, a native of Saxony, who wrote about 1683. (26) Successive Polygamy subjected persons at Rome to several penalties

rather permitted to the hardness of their hearts, than encouraged, as was the case with respect to their divorces, vid. St. Matthew, ch. 19. v. 8. Texts quoted against it are, from Genesis, ch. 2. v. 18. where two only were joined together, &c. and I. Corinth. ch. 7. v. 2. Let every man have his own wife, and every woman her own husband. Arguments against Polygamy, from the confusion it introduces into families—from the neglect of the childrens' education, &c.

See also, Vinnius, p. 49.

(25) China seems an instance to the contrary.

(26) By successive Polygamy is meant, a subsequent marriage after the death of the first consort.

and incapacities. By the Canon Law it is esteemed indecorous, but not forbidden. Marriage within the year of mourning is severely condemned by both.

I have now gone through the causes which, according to the Civil Law, rendered persons unable to contract marriage; and have classed them as that Law does, under such as are attended with turpitude, and such as are not. The more usual division of these disabilities in the English Law is, into Canonical and Temporal. The former are consanguinity, affinity, impotency and precontract. These render the marriage voidable by sentence of the Spiritual Court, if passed in the life time of the parties, but not after. The latter render it *ipso facto* void, and are, want of age, prior marriage, idiocy or lunacy, want of consent of parents or guardians (27).

We

(27) This distinction between marriages void and voidable, not having been sufficiently, in my opinion, explained by rudimental writers, not excepting even the two learned writers who have filled the Vinerian chair, I will beg leave here to insert my ideas on the subject.

Void and voidable marriages differ little as to their effects, when the latter is actually avoided; for example, if a marriage be avoided, as being within the Levitical Degrees, or of a minor having a certain fortune under the

We now proceed to the third grand requisite to a valid marriage, viz. that the parties should actually contract, under which head comes also the consideration of precontract; these contracts naturally divide themselves into contracts *de præsenti*, and contracts *de futuro*; the former in the Roman Law made and formed actual marriages, (tho' of

the statute in this country, the sentence has a retrospect, and makes it void *ab initio*; but if no such sentence during the life of the parties, in the first case, or within a year in the other, the marriage is good, and never can be avoided afterwards. It is, therefore, until sentence, a marriage both *de facto* and *de jure*; and so for ever if no sentence within those limited times; but a sentence, if passed within those periods against it, has a retrospect, and totally destroys its *de jure* effects from the beginning; it is in its origin *de jure*, and may for ever be so, or *e contra*, all its *de jure* effects may be destroyed *ab initio* by a subsequent sentence.

To explain—The issue of persons marrying, tho' within the Levitical Degrees, are legitimate, (a *de jure* effect) if no sentence during the life of the parties; if there be such sentence, are bastards. Now mark the difference of a void marriage, as *e. g.* for bigamy or idiotism; it never was *de jure*, it was void *ab initio*, the sentence does not make it void *ab initio*, it only declares it to have been so; in these cases therefore a sentence is not necessary; nor do I think it more so in cases of marriages by force and compulsion, however it may be prudent, tho' Mr. Woodeson seems of a contrary opinion.

the

the unsolemn sort) without any actual ceremony necessarily attendant on them. The latter being promises of future marriage, were usually attended with the deposit of an *arrha* or earnest, which on breach was forfeited (28).

The Canon Law considered them with a more curious eye, (and as contracts *de presenti* were present matrimonial agreements wanting nothing which the parties could contribute to form a marriage, but not celebrated by a priest) it considered them as marriages in conscience, and compelled a celebration in *facie Ecclesiæ*, extending the same privilege to contracts *de futuro*, if followed by consummation. These rules of the Canon Law were early adopted in England, and precontracts so circumstanced as above, invalidated future marriages. The Law in this respect in England underwent various changes, until ultimately their Marriage Act forbade the enforcing of any such contracts, and thus by implication, abolished the impediment of precontract. We

(28) Promises to marry are also the subjects of actions in Temporal Courts, but must be distinguished from promises in consideration of marriage, as to pay money, &c. these latter by our Statute of Frauds are invalid, unless in writing, and signed by the parties, or their agents, properly authorised. Statute of Frauds is in Ireland. 17. W. 3. ch. 12.

have

have not that act in Ireland, but we have an act 12 Geo. 1. ch. 3. which enacts, that no contract without consummation shall be of any force towards making void a subsequent marriage consummated.

Ultimately, the mere consent at Rome made a marriage, without any outward ceremony whatever; yet to produce certain legal effects the marriage must have been celebrated with certain forms and rites, or established by time, such marriages were called solemn (29), and were of three kinds, Confarreation, Coemption and Use; Confarreation was attended with sacrifices and *eating in communion of the same bread*, in presence of a Pontiff, or Flamen Dialis, and ten witnesses; it was the most solemn and religious form, and the woman thus married partook of all her husband's fortunes and sacrifices; it was in the earlier times common to all, but afterwards confined to Priests and Pontiffs only, or those whose children were destined for the Priesthood; it ceased to be commonly used about the time of Tiberius. *Coemption* was a fiction whereby the parties were supposed to purchase each other, and each of them

(29) These solemn marriages were properly *nuptiæ*, tho' that word sometimes signifies the nuptial banquet. Taylor distinguishes it from *matrimonium*, differently from Heineccius.

laid

laid down a piece of money for that purpose before Priests and witnesses; hence the concubine, who was not an harlot, but a kind of inferior wife (like the wife a *main Gauche* in Germany (30) was called *uxor Gratuita*, as not being married by coemption or purchased. 3dly, Use or Cohabitation, which if continued for a year, *mariti animo* constituted a solemn marriage (31).

In all these solemn ways of marriage, the wife was said *in manum convenire*, that is, the husband acquired a power very similar to the paternal both as to her person and estate, which became so distasteful to women, that latterly they fell into disuse, and mere consent (which was to be gathered by any conclusion that could be made) without any rite or ceremony, was the usual method; wives therefore to avoid the solemn effects of cohabitation contrived to be absent three nights in each year, for a marriage was not effected by use in less than a year, and that uninterrupted for more than

(30) This marriage, called *Morganatic* in Germany, is when a noble person marries a person of inferior condition, her children do not inherit; but her character is unspotted, and her husband obeys the impulse of his love without sacrificing his pride.

(31) Before the year ended the wife was *Matrona*, afterwards *Materfamilias*.

two nights. So that marriage by use, Dr. Taylor truly observes, was like taking on trial, or being upon liking, until ratified by a years cohabitation.

It remains to note some ceremonies which attended the actual marriage among the Romans. The brides hair was dressed after the manner of the Vestals; a yoke was put round the necks of the married couple, whence *conjugium*; a ring was sent to the bride; the bride was torn from the mother, who made a feigned resistance, in memory of the Rape of the Sabines; she was then carried to the husband's house, *domum dedueta*, the friends singing before her, *Hymen, O Hymenæ*; at the portal fire and water were presented to her, intimating that she must share her husband's fortunes and sacrifices; she was then with certain rites, made participator of the protection of his Lares and Penates, which was called *Sacrorum Communio*, and which gave an inheritance in, and a right of succession to his sacred rights, and almost by necessary consequence to those which were temporal, and hence, as the Lares could not be moved, the *Domum Deduc-tio* (32) became a necessary part of the rites and customs

(32) The *domum deduc-tio*, was the only ceremony of old in England; before the time of Innocent III. there

customs, from whence the man was said *ducere uxorem*, as the woman *nubere*. Whoever wishes to know more of this ceremonial must consult Heineccius, Teraffon, &c.

These ceremonies of course ceased, after the Empire became Christian, but it does not appear that they were succeeded by celebration by a person in holy orders, for marriage as is observed in the foregoing note, was not celebrated by the clergy, till the time of Innocent III; until that time therefore mere consent and contract to be collected as was said above, from variety of circumstances, made a marriage.

Let us now see what circumstances are required (besides an actual contract *between* parties willing and able to contract) to the validity of a marriage by the Laws of England and Ireland.

Marriage must be preceded by a publication of banns, or by a licence obtained (33); and must

was no solemnization of marriage in the church, but the man came to the house where the woman inhabited, and *led her home* to his own house. See Moor, 170.

In Scotland they have the marriage by use; living together as man and wife, or declaring themselves so before witnesses, makes a valid, tho' informal marriage. It need not be celebrated by a clergyman.

(33) Before the granting of *any* licence, say the letter of the Canons, two known persons must swear to parents consent

must be performed by a person in orders, in a parish church or chapel, unless by a special dispensation, and *during* the Canonical hours, *i. e.* between 8 and 12 in the forenoon.

The omission of any of these requisites, except that which relates to Canonical hours, is made fatal to the marriage in England by Act of Parliament. In Ireland, tho' it makes the omitting parties and particularly the person celebrating the marriage subject to penalties, yet none of these requisites are essential to the marriage, except that it be performed by a person in orders, which rule itself is *positivi Juris*, marriage not having been celebrated by the clergy in the earlier times, and formerly it was held that a marriage by a layman erroneously instituted to a cure was good (34).

Omission

consent ; hence I have said above, it is requisite at *any* age, to a marriage by licence ; but from the general context of the Canons, it is natural to suppose their spirit extended only to persons under 21 ; one of the parties also must swear there is no impediment, and a bond must be entered into to these effects.

(34) But it must not be conceived that the marriages of protestant sectaries must be by a clergyman of the Church of England ; if their marriages are solemnized according to their own rites, and both parties are of the

Omission of any other of the circumstances above enumerated, merely subjects the clergyman offending to penalties prescribed by the Canons, viz. of deprivation or degradation, without breaking the bonds of matrimony, in this kingdom.

Having now enumerated the various modes of marriage, and the impediments (35) to this contract,

same persuasion, they are good to all civil effects, (for instance, to support an ejectment, where legitimacy comes in question, or an action for criminal conversation) but if they come to entitle themselves to any rights in the Ecclesiastical Courts, as to administration, they must prove a marriage according to the Ecclesiastical Law. 1. Salk. p. 119. this at least was the case before the act passed in Ireland, 21, and 22, Geo. III. ch. 25, which enacts, that all marriages celebrated between Protestant dissenters by protestant dissenting ministers and teachers, shall be as valid, and the parties entitled to every right as much, as if solemnized by a clergyman of the Church of Ireland; to this act one main objection was evident, that the meaning of protestant dissenter not being sufficiently, if at all defined, members of the Church of England might call themselves protestant dissenters for this particular purpose, and thus evade the necessity of banns or licence; *but for the able protest against this bill, signed by an uncommon number of Peers, see the Appendix.*

(35) Among these impediments one has been omitted, not very generally noticed; the Canons forbid clergymen

to

tract, method would lead me to describe its legal consequences ; but it may be useful previously to note some miscellaneous subjects, not reducible to any of the preceding heads. These relate to offences against the rights of marriage—to the penalties of illicit and clandestine marriages—to conditional restraints on marriage, and to marriage brokerage bonds or agreements.

Forcible marriages and abduction, were by the Roman Law considered as equally criminal with rape, and each of these offences was punished with death. With us the law on this head depends, on various statutes (36).

As

to marry persons who cannot say the Creed, Lord's Prayer and Ten Commandments ; might not the fashionable world be some times puzzled by a clergyman strictly obeying this dictate?

(36) By 10 Car. I. Irish, taking or conveying away a maid or woman child unmarried within 16, if done by any person above 15, punished with two years imprisonment ; taking away and deflowering or marrying such person, five years imprisonment ; the woman loses any lands she might have during her life.

By 6 Anne, ch. 16, seducing and marrying heiresses under 18, punished by three years imprisonment, and their estates vested in trustees. By the same act, if any maid or woman be carried away by force, and afterwards married

As to illicit marriages, the Institutes after reciting the prohibitions of marriage, declare that if any persons presume to cohabit in contempt of the rules above recited, they shall not be deemed husband and wife, neither shall their marriage or any portion given on account of such marriage, be deemed valid. The Code added also pecuniary mulcts, infamy, & *cum infamia penam stupri*, (37) which was confiscation of half the goods.

Our laws bear a strong general analogy, they in numerous cases make clandestine marriages and those illicit, (whether so from attention to the law of God, natural or revealed, or from reasons of state) void or voidable—and where

married or defiled, *with or without her consent*, felony without benefit of clergy.

(37) *Stuprum est, quod virgini vel vidua honeste viventi sine vi inferitur*—this is its definition in the Pandects, which Wood thus explains, *Stuprum*, says he, is when an unmarried man lies with an unmarried woman who lives in reputation, and is not suspected to be a common prostitute. Violence however did certainly in some cases make an ingredient in the offence of *Stuprum*, so that it seems a word of various significations. Its meaning has been frequently disputed by the interpreters of College Statutes.

they

they do not, they annex penalties to the parties, or to the priest celebrating the nuptials (38).

The

(38) These penalties as to clandestine marriages, are principally to be found either in the Canons, where they relate chiefly to the minister celebrating them without banns or licence, and subject him to deprivation if beneficed, degradation if not; or in the act 6th Anne, ch. 16, which, where the husband's father has fifty pounds a year, in lands, or five hundred pounds personal estate, and by subtle means the marriage is procured, or the party being under 21, contracts matrimony without the requisite consents, disables the wife from recovering dower, thirds, or jointure, subjects all accessaries to three years imprisonment, and makes the person celebrating the marriage, if a beneficed clergyman, liable to deprivation, if not, to transportation.

Our Irish laws respecting marriages illicit, for reasons of state, relate principally to those between papists and protestants, and their variations require some attention; it is no longer necessary to enumerate them all, but the principal were the following; by 9 W. III. ch. 28. marriage by a clergyman, of a woman protestant, having freehold, or leasehold estates, or in personal property five hundred pounds, to any person without certificate of his being a protestant, subjected the clergyman to fine and imprisonment, but the marriage was not void.

By 12 Geo. I. popish priest or degraded clergyman, or layman, marrying two protestants, or a protestant to a papist, guilty of felony without benefit of clergy.

By

The Civil Law permitted the *Proxenetæ* or match makers to receive a reward for their pains, C. 5. 1. 6 (39).

All restraints on marriage were held void by the Civil Law, and so they are by our Ecclesiasti-

By 19 Geo. II. all marriages between protestants and papists or between two protestants celebrated by a popish priest, are *ipso facto* void. Upon this clause disputes have formerly arisen, whether it avoided all marriages between protestant and papist, or only those celebrated by a popish priest. If it did not invalidate all such marriages, I know of no other law that did. It is now only a question of curiosity, but the sense of the Legislature upon it is sufficiently evident, by their thinking the act of 32 Geo. III. necessary.

But the law in these respects is almost entirely altered by the statute 32 Geo. III. ch. 21. which repeals the above act of the 9th of William, and authorises the intermarriages of protestants and catholicks, provided they be celebrated by a clergyman of the Established Church, and by 33 Geo. III. ch. 21, a popish priest may marry protestants, or protestant and papist, if they have been previously married by a protestant clergyman, otherwise the marriage is void, and the priest subject to a penalty of five hundred pounds.

(39) Marriage brocage bonds and agreements to reward persons procuring a marriage, are entirely forbidden with us, and vacated by Courts of Equity.

cal

cal Courts, the rule being there also, *maritagium debet esse liberum*, vid. 3 P. Wm. p. 239. *Wrotesley v. Bendish* (40).

We must not conclude this lecture without observing, that besides the honors and rewards annexed to marriage at Rome, such as the *Jus trium liberorum*, which conveyed various privileges and exemptions, the laws actually compelled marriage, by punishing celibacy with fine, and it was a branch of the Censor's office to put it in execution; on the same principle, a parent could not disinherit a daughter for incontinence, for whom he did not provide a husband before 25; even the childless lost one half of a legacy bequeathed, the other escheating to the Exchequer.

(40) I have mentioned in an Introductory Lecture, that a condition in restraint of marriage prevails, e.g. a conditional legacy is forfeited if there be a devise over to another person, in failure of condition, but even so, our Courts of Equity have uniformly leaned against these restraints, and anxiously endeavoured to construe them as meant only *in terrorem*, or to find out some virtual compliance, and if the condition be consent, that consent, if denied without reason, is not regarded. Devises over are however sometimes considered in the light of a forfeiture, nor has the party when it is a forfeiture any cause to complain, if already well provided for by the same will, and therefore if it be in such a case a condition precedent to a marriage, it cannot be got over.

Q

But

But in later times, the privileges attending the parent of three children, were by a benign fiction extended to others.

It must also be noted, that the man who had not a wife, might lawfully have a concubine, but not both together. The Popes of old authorised concubines; and it appears by our Legatine Constitutions they were usual with the Clergy.

A concubine does not mean in the Civil Law a harlot; the concubine was a person taken to cohabit in the manner, and under the character of a wife, but without being authorised thereto by a legal marriage. Concubinage was confined to a single person—was of perpetual obligation as much as marriage itself—was a society recognized by the laws, and in general entered into between persons, who by laws of policy were forbidden by the state to marry together for want of quality or fortune—the Concubine might even be accused of adultery. These characters shew how widely mistaken we should be, if we annexed the idea of immodesty and contempt, to the name of Concubine among the ancients, as we do in modern times.

Lecture the Second.

H U S B A N D A N D W I F E.

Continued.

HAVING treated in the last lecture of the method by which marriages were formed among the Romans, I proceed to consider their legal consequences, and afterwards the ways in which this connection might be dissolved.

As to their legal consequences, we shall find many instances of diversity between the Roman Law and ours. One grand distinctive principle between the two laws on this subject is, that by theirs, Husband and Wife were considered as distinct persons who might have separate estates, contracts, debts and injuries, whereas ours treats them only as one, such is their supposed union. On this principle rests great part of the variations on this head, between the two codes.

Hence, in the first place, they might grant to and contract with each other, upon valuable consideration, a privilege unknown among us, but gifts between them without consideration were

Q 2

invalid,

invalid, lest affection should be made the dupe of art, and excessive fondness the instrument of ruinous donation (1). On the same principle they might sue each other, as they are allowed to do in those of our Courts which have chiefly retained in view the Imperial Constitutions, viz. the Courts of Equity (2) and Ecclesiastical. This liberty, however was so far restrained at Rome, that the husband could not have an action against the wife, implying infamy or turpitude. If a divorce indeed took place, she might be convened for goods previously by her taken, in an action *rerum amotarum*, and if she stole his goods after a divorce, she was liable to an action of theft (3).

From this power of contracting in the wife, the mischiefs which might be apprehended were

(1) Gifts between husband and wife among us, are often supported in Equity, tho' the Law does not allow the property to pass, Fonblanque vol. 1. p. 94. He may give by the intervention of Trustees and by Will. 1. Blackstone.

(2) Vid. among many others, Brooks and Brooks, Pre. Ch. 24. Moore v. Lady Moore. 1 Atk. 272. Oxenden and Oxenden, 293.

(3) The phrase of Convening, and the expression an *Action of Theft*, so novel to the Student of Common Law, will be explained in the sequel.

obviated

obviated by rendering her contracts inoperative upon the husband, as fully as his were upon her; as they were separate persons, they were unconnected in their agreements with others, and the wife might sue and be sued without her husband, as she may now in our Ecclesiastical Courts (4). The fourth book of the Code expressly declares, that the husband shall not be bound by the wife's debts or contracts, and gives the reason, *nam neminem alterius contractu obligari, certissimum est*. The husband was indeed obliged to maintain the wife, even tho' he married her without a wedding portion, but this obligation if violated, only gave her a right to sue him for alimony, but did not make him liable to her debts (4).

As the husband was not answerable for the wife's debts, so neither was he for the injuries by her committed, nor is he with us, for the union in the English Law is merely a Civil Union, they do not make one person when considered in a criminal light; with this exception, that

(4) With respect to the effects of his debts upon her estates, or his power over her estates, that part of the subject will be found in its proper place, under the head of Title by Marriage, in the 2nd book which treats of Rights to Things.

with

with respect to some inferior offences she is screened by him, on the supposition of being under constraint; and as here husband and wife join in actions for injuries done to her, so at Rome, he was to defend her from injuries, and might prosecute the author of her wrongs.

It might be supposed that husband and wife being thus separate persons, might be witnesses for or against each other. They could not (5); which seems to confirm the opinion of Dr. Christian, in opposition to Judge Blackstone, that supposed union of person is not the principal ground of this prohibition, but the want of indifference naturally to be expected. The Roman law so far apprehended the partiality of affection, and respected the peace of families, as to refuse the reciprocal evidence of father and son, and brother and sister; and in France, Domat informs us, that the depositions of kindred were rejected, as far as the children of cousin germans.

It remains only to consider, among the personal effects of marriage, the power of the husband over the wife's person; in this respect the Civil Law did not materially differ from ours, at least in later times (6), both allowed the husband

(5) See Wood, 315.

(6) For in earlier it gave the husband a power of life and death over the wife, for grievous crimes, as well as over the children, Dion. Halyc. Plin. Nat. Hist. 14 B.

(however

(however harsh such powers may now appear, and however justly forgotten in polite life, and refined society) to correct the wife with moderation; the Civil Law indeed was less attentive to this moderation than ours, since it allowed in some cases, *flagellis & fustibus acriter uxorem verberare*; but still there was a limit, and a certain degree of cruelty enabled her to obtain a separate maintenance, or even a divorce; there are some vestiges of old severity under the Emperors, vid. Suetonius, Tiberii vita. Tac. Ann. 2. 13. 32. It must be observed, that if the wife had not been emancipated by her father, she remained in the father's power, not in the husband's, tho' not so far as to give her a full power over her property by her father's consent only without that of the husband; she took the husband's name, as daughters did their father, whence in inscriptions, *Antonia Drusi*.

D I V O R C E.

I come now to consider how marriage may be dissolved, and this is either by Death or Divorce (7)

Plutarch in his life of Romulus, tells us, that he permitted an option of Divorce to men, but not to women; there must however be a cause,

as

(7) Who ever compares the text above with the following note, will see how much better this matter has been regulated

as adultery, attempt to poison, &c. perhaps drunkenness; for we find from Dion. Hal. &c. that the husband could severely punish this offence, after having laid the case before her relations. The twelve tables allowed divorce, but not without good cause. Yet, notwithstanding this permission, there was no instance of Divorce at Rome, till the year U. C. about 500, when Spurius Carvilius Ruga parted with his wife for sterility; but afterwards they became beyond measure frequent. Wives were dismissed, not only for want of chastity, or for intolerable temper, but for the slightest causes.

Paulus Æmilius dismissed his wife, assigning this general vague cause, that she injured him. Sulpicius Gallus, because his wife went abroad bareheaded. Sempronius Sophus, because she
had

regulated among modern Christian nations, and how differently from that loose union amongst the Romans, which might be dissolved so easily, and upon such trifling occasions; in the first place, even when among us, there is reason for a separation, it does not follow, that there should be a total separation, a partial may answer the purpose, which we call *a mensa et thora*, from bed and board. This does not give the parties liberty to marry, nor does it bastardise the children begotten before the divorce, and the parties may live together again if they please.

A divorce

had gone to a public spectacle without his knowledge; and even Cicero Publilia, because she seemed to rejoice at Tullia's death. The famous instance of Cæsar sending away Pompeia, because Cæsar's wife should not even be suspected, is in every one's mouth.

In later times, wives had a licence of divorce at their pleasure, and practised it abundantly, on flight or no causes.

In Cicero's Epistles, Cælius writes to Cicero, *Paulla Valleria soror Triarii, divortium sine causa, quo die vir e provincia venturus fuerat fecit. Nuptura est D. Bruto.*

Divorces

A divorce a *Vinculo Matrimonii*, has all these effects, if made on account of Canonical impediments by the Spiritual Court.

The causes of divorce, a *Mensa & Thoro*, are very various, such as cruelty, intolerable ill temper and so forth. But the causes for which the Spiritual Court can dissolve the marriage a *vinculo*, must be such as are either grounded upon the express words of the Divine Law, or plainly derive their origin from that source, such as consanguinity, affinity and certain corporeal infirmities—for these causes the marriage is voidable, not void without sentence; and to avoid it, there must be a sentence of nullity, declaring it to have been void. This can only be obtained during the life of the parties, because it is *pro salute animarum*. Even

R

adultery,

Divorces were made with certain solemnities, and these solemnities corresponded to the respective modes of marriage; if the parties had been united by *Confarreation*, they were separated by *Diffarreation*. It is not clear, what were the ceremonies received upon this occasion, except that we know, that this as well as *Confarreation*, was a species of sacrifice, and that a Corn Cake was made use of in both. Plutarch mentions this mode of divorce, and from him we learn, that it was attended with some horrid and ill omened rites. He speaks of the divorce of a *Flamen Dialis*, who was always, *I believe*, married by

adultery, tho' the only cause of divorce, assigned in the New Testament, is not in the Spiritual Courts, a cause of divorce *a vinculo* but only a *Mensa & Thoro*. To obtain a divorce *a vinculo* then, an act of Parliament must be had, and this is usually granted only in cases of adultery on the part of the woman; but of late years, some shameful causes having been brought to light, where it appeared that the parties wished to be parted *a vinculo*, in order to marry again, and therefore had by consent laid a scheme that the woman should be detected with the adulterer, and perhaps only with a sham paramour, Parliament has leaned a little against such acts, and refused them in several cases where circumstances

by Confarreation. Those who were married by Coemption, were divorced by Remancipation; as the form of marriage was to buy, so the form of divorce was to set free, or to make over to another. By this form of divorce, Cato of Utica espoused his wife Marcia, to Hortensius, a remarkable fact mentioned by Plutarch; as the fiction was that he bought her, he might sell her to another by fiction. Thus we find from Dio. that Tib. Nero gave his wife Livia, even while pregnant, to Augustus; in the same manner, that a father was used to give his daughter. If a wife was obtained by use, she had it in her power
to

circumstances were suspicious, and Lord Thurlow has been particularly active in setting his face against such contrivances.

The same thing would happen, as to divorces in the Spiritual Courts, if the sole confession of the parties were to be admitted, even tho' upon oath: of this we have an instance in *Mod. Rep.* 2. p. 315. The husband and wife agreed that a libel should be given in against him, that he had before married her sister, and they procured the sister to come in and confess this. This prohibition against receiving the sole confession of parties, is found in the Canon Law, and is expressly inserted in the Canons of our Church, for in old times separations were made among us on this confession, and were then very numerous and frequent.

to divorce herself, by being absent from her husband three nights before the end of the year. The very absence constituted a divorce. In later times the ceremonies of divorce were few and very simple. Breaking the *Tabulae Dotales*, as appears from Tacitus, Ann. 11. 30. depriving her of the keys, which were always delivered to her among the forms of marriage, and sending her a message in a certain form of words, both verbally and in writing, intimating the intention to separate, was sufficient.

Augustus, who wished to put some checks in the way of divorces, directed that there must be seven

If the marriage be originally void, there seems to be no occasion for a sentence of separation, and in that case the wife is barred of dower, the issue is illegitimate, and the persons may marry again; thus for example, in the case of Bigamy. Cro. Eliz. 857. Debt upon an obligation; defendant pleaded, that at the time of making the bond, she was wife to a person therein named. The plaintiff shewed, that that person had a wife alive at the time he married defendant, and there had been a declaratory sentence in the Spiritual Court. Judgment for the plaintiff, and said there was no occasion for such declaratory sentence.

If

seven witnesses to the divorce, all Roman Citizens, and adult, otherwise it was invalid.

The effects of divorce, were of course, with respect to the person, liberty to marry again, and a total freedom from the former husband's power. I do not find that the Romans were acquainted with that partial species of divorce, called with us, a *mensa & thoro*. But if she was divorced on account of her own misbehaviour, or bad morals, the husband gained all her dowry. Hence it became a practice, to marry women of known bad conduct, in order to have an opportunity of proving it, and thereby gaining the dowry. An example of such a man, viz. C. Tinnius

If the marriage be voidable for Canonical Impediments, then after sentence the effects are the same as if it was void *ab initio*.

Effects of Divorce a Mensa & Thoro.

This does not bar the wife of dower, nor bastardise the children, nor prevent the husband from enjoying her property, or whatever may come to her; but he must allow her alimony; where indeed the divorce is for her own crimes, the Court at their direction may refuse her alimony; and if she elope, and live with the adulterer, she loses dower. In the year 1554, Burnet mentions a petition of the Clergy in Convocation to the Upper House, that in divorces which are made from bed and board,

tinnius of Minturnæ, is mentioned by Plutarch, in his life of Marius. If the divorce was for his own fault, she or her father got back her dowry. *Dowry* in the Civil Law always meant the portion brought by the wife; a very different signification from Dower with us.

Hitherto we have spoken of divorces at the will of one party; but if both consented, there seems to have been no difficulty, and in that case the wife not only took back her dowry, but also carried away all the gifts and presents made by the husband.

Divorce

board, provisions may be made that the innocent woman may enjoy such lands, and goods, as were her's before the marriage, or that happened to come to her use, at any time during the marriage; and that it may not be lawful for the husband, being for his offence, divorced from the said woman, to intermeddle himself with the said lands or goods, unless the wife be to him reconciled. But we do not find any consequence of this petition.

The children born after a divorce, *a mensa et thoro*, during such separation, are bastards, 1 Salk. 123. for a due obedience to the sentence shall be intended, unless the contrary be showed. But if *Baron and Feme*, without sentence part and live separate, the children shall be taken to be legitimate. and so deemed, till the contrary be proved, for access shall be intended, until the contrary is shewn.

The

Divorce is only between persons actually married. But there was also a mode of separating persons only espoused, and this was called not *Divortium*, but *Repudium*. Here there was no occasion for any particular cause, whim was sufficient, no action lay for the breaking off, and the only form was, sending this message, *Tua conditione non Utor*.

A comparison of this Law with ours has been carried on in the notes underneath, and completes

The Canons direct, that in all sentences of divorce, *a mensa et thoro*, there shall be a caution and restraint inserted in the body of said sentence, that the parties so separated, shall live continently, and that they shall not, during each others lives, contract matrimony with other persons, and no sentence is to be pronounced, till the parties give security to obey this restraint. At a time when a reformation of the laws was intended, this sort of divorce was designed to have been taken away, and the book called *Reformatio Legum*, which is a sketch of some part of what was proposed, condemns this species of divorce very severely, as *constitutio a sacris literis aliena*. Reform. Leg. 28, 6.

Even tho' the husband has been divorced *a mensa et thoro*, on account of the incontinency of the wife, yet he cannot marry again during her life. Mo. 683. yet by the law of Heaven, he might—Whosoever shall put away his wife

pletes our observations, on the subject of marriage, the Law of which however is so extensive, that some things must necessarily have been omitted, and among other topicks, I may be blamed perhaps for not here touching on two not unimportant, the effects of Statute Laws on contracts of marriage abroad, and the effects of a sentence in the Ecclesiastical Courts; but it must be recollected, that these belong to other and more general heads (8). I shall therefore, only here observe, that an act of Parliament not confined by words to operate in this country only, cannot be evaded by going abroad, *e.g.* the Law of this country annulling marriages of minors in certain cases,

wife, *except it be for fornication*, and marry another, committeth adultery. Matt. 19, 9; and the *reformatio legum* would have allowed another marriage, when the divorce was for such cause, unless both parties were guilty, and this is the doctrine of the Canon Law. Extra. lib. 4. tit. 19. c. 5. t. 16. upon this principle, some acts of Parliament for the divorce of parties on account of adultery, have expressly allowed the innocent persons to marry again. Acts of Parliament have never been made to divorce *a vinculo*, except for adultery.

Recrimination supported by proof is a bar to divorce in the Spiritual Courts, for adultery.

(8) The first to general principles regulating foreign contracts, the other to the head of Courts Ecclesiastical.

would

would reach a marriage in the Isle of Man, or elsewhere (9), and that a sentence of the Ecclesiastical Court, obtained in a suit in its nature definitive, and obtained without fraud or collusion, is conclusive evidence in any other Court (10).

(9) The marriage act in England not reaching Scotland, does not contradict this principle, because that act is conceived expressly to confine itself to England.

(10) A common idea to the contrary has gone forth among men not of the legal profession, from the Duchess of Kingston's case. But the sentence she offered in bar, was in a suit for Jactitation, which suit is not definitive, and never passes in *rem judicatam*; it only shews that for the present, the boaster has not proof, and enjoins him to silence, but with liberty to bring new proof whenever he can; and besides the sentence appeared to have been obtained by collusion. But the Lords never determined that a fair sentence, in an Ecclesiastical Court on the same identical point, coming directly before it between the same parties, in a suit in its own nature definitive, was not conclusive, *e. g.* plea of coverture by a woman in a personal action, sentence of nullity conclusive evidence against her.

Lecture the Third.

MASTER AND SERVANT.

IN treating of the Rights of Persons, the first relation which the Roman Law offers to our view, is that of Master and Servant, or rather of Master and Slave, for at Rome, Servitude was in theory, and generally in practice the extreme of Slavery. It is a melancholy consideration, that on the very threshold of this magnificent pile of Jurisprudence, erected by a Nation whose mighty boast was Freedom, Slavery should present itself in its most hideous form. Nor is it unworthy of reflection, that nations most attached to liberty, seem to consider it as a treasure confined to themselves, an inestimable blessing which they avariciously embezzle, and refuse its extension beyond their selfish limits.

Liberty and Tyranny have kept pace with each other. The Helots of Sparta, the Slaves at Rome, the Villeins of the Feudal System, bear testimony to this melancholy truth. Sorry we must

must be to add to the number, our native countries, which have fixed the model of Rational Liberty among Nations; whose singular glory is the enjoyment of Freedom, and which have notwithstanding, in the Colonies established a system of cruel Slavery, perhaps beyond example in any other age or realm.

That no system of Slavery can find a foundation in Justice and Reason, has been often demonstrated by the ablest writers. Its pretended justifications set up by Justinian, of Captivity, Contract and Birth, will not stand the test of common sense. The Rights of Conquest have no such extent (1)—Self-imposition of Voluntary Slavery is forbidden to man by the Law of Nature—and Hereditary Slavery cannot exist when the grounds of original servitude are taken away. But little will arguments of reason prevail with avarice and injustice—on men possessed of such passions, small will be the effect of painting the horrid cruelties which result from vesting unbounded power in weak, impotent, frail mortals. If a direct appeal to feeling does not succeed, argument and eloquence are useless on the subject, for they must be addressed to brutes.

(1) Vid. Locke on Government.

Since however, Slavery has pretended to a ratification from Law, I must proceed to my duty of unfolding the condition of Slaves at Rome, (for as to that of menial servants or apprentices, antiquity has handed down to us so little on the subject, and Slaves, as in our West Indies, seem so entirely to have supplied the deficiency of free servants, that it is not worth our pains to treat of them) nor will a comparison of the situation of the Roman Slave, with that of the ancient Villein, and modern Negro, be foreign to the subject.

The Romans divided persons, in their most general discrimination of them, into Freemen and Slaves. Freemen again, into such as were in their own power, *sui juris*, and such as were not, and by another distinction, into such as had always been free, called *Ingenui* (2), and such as had been made so, called at various periods, sometimes *Liberti*, and sometimes *Libertini* (3).

(2) An unjust or illegal servitude did not prevent a man from being *Ingenuus*.

(3) In the earlier ages of the Republic, *Libertinus* meant the son of a freed man, but afterwards, equally with *Libertus* it meant the freed man himself. When Horace says, *Libertino Patre natus*, he means that his father, not his grandfather, was the freed man.

Of

Of Slaves themselves the Romans did not reckon different orders, their reason for which requires some explanation, and will tend to throw light on some other parts of their Law.

They considered persons, and they defined the meaning of the word to be, not only human creatures, but men considered in relation to some state, either natural, a state of nature, or civil; if civil, that state to which he was referred, was either of liberty, citizenship or family (4). Now as a Slave was a stranger to liberty, could not be a citizen, and had not the rights of a master of a family, he was not allowed to be a person, but considered as a *thing*, and consequently the distinctions of persons into orders, was not considered as having relation to him.

This quaint and pseudo philosophical idea, (for the Roman lawyers were extremely fond of borrowing from the Sects, particularly from the Stoicks) did not exclude many real distinctions of Slaves into temporary and perpetual, conditional and

(4) Losing any one of these states or conditions was called *capitis diminutio*, and was either *maxima*, when all these three rights were lost—middle, when only citizenship—least, when only those of the master of a family. The explanation of these terms is often requisite to the understanding of Latin Authors.

absolute,

absolute, those who were attached to the soil, *Adscriptitii Glebæ*, (resembling a certain class in the French West India colonies) and those which were not.

I shall now consider how Slavery was created. Secondly, Its effects. Thirdly, How dissolved, and in the notes compare their law upon these heads, with the ancient English, and modern West-Indian codes.

SLAVERY, HOW CREATED.

First, by Captivity,—Hence they said *Servi* were *Quasi Servati*, & *Mancipia quasi Manu capti*; fanciful etymologies of the Stoicks, which they substituted for definitions. This pretended foundation of Slavery, has been so successfully exploded by Locke, Blackstone, and many other writers, that it requires no new argument to expose its futility. Accordingly among modern civilized nations, captivity in war has produced no such effects, nor even in the wars of Mahometan Princes among themselves. The English colonist in the West Indies, indeed has not blushed, at supporting this assumed justification of Slavery, in concord with the African Barbarian from whom he purchases,

Secondly,

Secondly, By Birth,—Slaves were things, as we have observed, and therefore the child of the female Slave, was considered as belonging by accession to the master ; and the rule was with respect to Slaves, *Partus sequitur Ventrem* (5), a maxim which prevails in all our West India Colonies ; whereas among free persons, their law as well as that of England, ordains that the child should follow the condition of his father, and indeed the law of England made the rule universal ; therefore, in ancient times, if a bond woman or neise had married a free man, the issue was free ; and at Rome in favour of liberty, if the mother at the time of her conception, or delivery, or in the intermediate time between them, had been free even for a moment, the child was free.

Thirdly, by Sale—from others or themselves, for persons of above twenty years of age might sell *themselves* to Slavery, which no man can do by our laws ; *i. e.* he cannot reduce himself to absolute Slavery (5), tho' he may bind himself in certain articles of servitude, for years or for life, as do the indented servants, usually so called, who frequently thus get themselves conveyed to our

(5) By absolute slavery I mean subjection to unlimited power over life and fortune. Captivity, birth and sale, the usual origin of slaves in the West Indies.

plantations,

plantations; the Jewish Law permitted this practice.

Fouthly, By Crimes,—But this, for the most part, was only for capital crimes. An exchange of punishment which of late years our laws have adopted in some measure by condemning criminals, tho' not to gallies, yet to working in the hulks, and near them. A measure, I own, repugnant to my judgment, and tho' it has been in our times admitted, yet in former periods, so odious to the feelings and opinions of the English, that an attempt to introduce it in the reign of Edward VI. was so universally condemned and reprobated, as to be instantly quashed; however the resemblance of the state of these culprits to that of the Roman *Servi Pœnæ* is but remote, the latter losing the rights of marriage, of making wills, and almost all other privileges of man.

Fifthly, A few crimes or offences, less than capital, by which persons were reduced to Slavery, as they were mere creatures of Roman positive and temporary Laws need barely be mentioned; these were frauds, to avoid the Census, or Muster Roll, in order to escape the war levies or requisitions—not appearing at the end of a year, after having entered into recognizance in some court to appear—criminal intercourse between a free woman and slave, which reduced her to his condition

tion—tried and decided ingratitude by some proper tribunal in a freedman towards (6) his patron, which reduced him to his former state.

2. EFFECTS OF SLAVERY AT ROME.

Servants at Rome were things, therefore the master had the same power over them as over things, could sell them, or give them away by donation or legacy, could put them to death, or punish them at pleasure, and whatever they acquired, they acquired not for them-

(6) In England Slavery existed among the Saxons, introduced perhaps by Danish tyranny, tho' the origin of it, or upon what foundation put (probably I think conquest) does not seem to be ascertained, and was reduced on the Norman Conquest to the state called Villenage; in our West Indies the pretended foundation of Slavery must generally be captivity, birth or purchase from African venders of captives, criminals, debtors, or hereditary Slaves. That Slavery cannot be created in England, or even exist, is universally known since the determination in the case of *Somerfet the Negro*, in 1772, and the necessity of baptism to freedom, coupled with the notion that Heathens could legally be enslaved, has long since been exploded. Kinds of Slaves were, ordinary, or *adscripti glebæ*, so Villeins regardant or in *grofs*—Slaves in the French West Indies, attached to the soil or not; but alas! no such distinction I apprehend in our colonies.

T

selves

selves but their masters. This immense power degenerated into barbarism, until in later and more civilized times laws were made to restrain unbounded magisterial tyranny. Augustus began by directing the Præfect of the city to take care that no immoderate cruelty should be exercised upon Slaves. In the reign of Claudius, a law was enacted, making the crime of killing a Slave, homicide; a law apparently inefficacious, since at a subsequent period, Juvenal Sat. v. l. 219. introduces a lady ordering her Slave to be crucified, a remonstrance is made to her, that he is innocent, she makes the celebrated answer,

Nil fecerit, esto,

Sic volo ! sic jubeo ! stet pro ratione voluntas.

The Roman indeed seems to have been ingenious in inventing torments for his Slave. *Stimuli, laminae, cruces, compedes, nervi, catenæ, carceres, tortores, suspensa a pede centipondia*, are terms perpetually occurring in Latin Authors (7).

Adrian

(7) Let us now compare his condition with that of the Norman Villein and Colonial Negro. If among the Saxons a Slave's eye or teeth were beaten out by the master, the Slave recovered his liberty; if he was killed, the master only paid a fine to the king. The Villeins of the Norman æra were in a better situation, the lord was not allowed

Adrian repressed this torrent of horror, by something more than words, he banished several persons, who upon slight causes had treated their Slaves with cruelty. Antoninus Pius extended the penalties of the Cornelian Law made against assassins to those who should kill their Slaves without just cause; which just cause seems to have been, finding him in a plot against his master's life, or in adultery with his consort; and a law in the code, gave the Slave a remedy, if he was intolerably

lowed to maim, much less to kill them; it is true that whatever the Villein acquired belonged to his master, e.g. if he purchased land, and that he could not prosecute an action against his lord, but he might bring suit against all other persons, and even against his master, might have an appeal for his ancestor's death, and the chastity of the Neife was protected from outrage by giving her an appeal of rape.

It is matter of real lamentation, that the comparison of these conditions with that of the Slave in the West Indies is plainly favourable to the former.

It is said however that the accounts of Colonial cruelty have been much exaggerated, and much pains have been taken to combat the general conviction by assertion, and by evidence. To avoid such imputations, let us recur then to undisputed facts, acknowledged by clear sensible and well informed writers, acquainted with those regions, and long resident there. It does not seem to be disputed

ably punished by his master, so that in the later periods of the Roman Empire, his condition was ameliorated in a very considerable degree.

OF DISSOLVING SLAVERY, OR MANUMISSION.

Census, *Testamentum*, *Vindicta*, were the ancient methods and the solemn ones. The first was by enrolling the Slaves name in the Cenfor's Rolls, by order of the master.

This

by them, that until within these few years, the power over life and limb, was either expressly given to the master as well as that of whipping and beating without limit, or at least such exercises of authority were either overlooked or slightly punished. In Barbadoes, the wanton and wilful murder of a negro is said to have received its compensation, by the payment of 15*l.* sterling, into the public treasury: and in Jamaica, until the year 1792, a white man, whether proprietor or not, who had killed a negro, or by an act of severity been the cause of his death, was for the first offence entitled to benefit of clergy, and not liable to capital punishment, unless he repeated his crime.

That dreadful and unmerciful scourgings were inflicted will not be denied, and all that Mr. Edwards, the ablest advocate for the colonies, has said is, that they have not been frequent. (The narratives, says he, of excessive whippings,

This method was out of use in Justinian's time, and even from Vespasian's. Constantine in the room of it, introduced Manumission in church. It was usually done at Easter, in a public manner, and the act registered. The method by will requires no explanation.

Vindicta ; The master twirled the servant round, declared him free, and with a blow dismissed him, whence Persius, Sat. 5. l. 75. *Heu ! steriles veri, quibus una Quiritem Vertigo facit*. This was done in the presence of the Prætor, whose lictor with his wand, (called *Vindicta*) tapped the Slave on the head, who then was free, his name was then enrolled

whippings, and barbarous mutilations, shall not be asserted by me as they have been by others, to be all of them absolutely false. Though they have happened but seldom, he adds, they have happened too often.) That the power does exist has been acknowledged, and let me ask the heart of man, when not swollen by inordinate vanity, whether such power can exist without abuse—let the mildest native in these climes recollect the temporary passion produced by the offences of menial servants attended perhaps with circumstances of real and considerable provocation, and ask whether at the instant his reason could always be confided in, as the guardian of his anger. The heart of man is deceitful above all things and imposes upon its owner. I do not charge the West India Planter with being naturally bad, nor deny his being

enrolled in the list of free men, his head was shaved, and the cap of liberty put on it. Hence I suppose, we paint Liberty with a wand, and a cap at the end of it.

Less solemn methods of Manumission were, by letter, or writing, to which however Justinian required the subscription of five witnesses.

Inter Amicos, i. e. by parol, calling together five friends to witness it.

Per Convivium, Where the Slave was admitted to the master's table, it made him free: for it was indecorous for a master to sit down with a Slave.

By

being in many cases a good and beneficent master. Even those who are otherwise may perhaps often be the victims of habit and usage, overcoming a good disposition. Caligula had he been a subject under a well regulated government, might possibly have exhibited a tolerable character. I mean only, that unlimited power is suited to none but the Allwise and All Good Creator of the Universe, and generally in the breasts of frail mortals exterminates humanity; he who supposes himself able to wield such a sceptre, while he thinks he standeth, should take heed, lest he fall.

But departing from arguments founded in the nature of things and man, let us consider the facts implied by the famous consolidated act passed in Jamaica in 1792, the boast of Colonial philanthropy. That act prohibits arbitrary

By nomination, When the master called the Slave son; this mere appellation did not entitle him to the right of an adopted child, but made him free. There were many other of these less solemn modes of Manumitting. Hein. p. 30.

Of persons manumitted, at first there were no degrees, all were in equal condition. Afterwards, two remarkable laws, were made, *Ælia Sentia*, & *Junia Norbana*, occasioned by the improper and guilty villainous persons, who had been often manumitted, and thereby obtained the rights of Roman Citizens. By the first, persons manumitted were put only in the condition of the *Dedititii*, i. e. of those people, who had surrendered

bitrary and unlimited punishments—makes the murder of a negro a capital crime in the first instance, forbids the loading them with iron chains, collars or weights, except when necessary for securing the person of the Slave—punishes with fine and imprisonment his mutilation, and in certain cases imparts freedom to the injured, allows them certain holidays, gives them one day in a fortnight, exclusive of Sundays, to cultivate their own provision grounds, with many other humane provisions, some of which I am ready to admit, had been before received by law or custom, yet the general view of that act will prove to the investigator the cruelty of antecedent practice, by the necessity of its novel regulations, and notwithstanding its salutary effects, the following hardships

dered unconditionally to victorious Rome. The latter gave to persons manumitted, by the less solemn rites, not coming within the former law, the rights not of Roman Citizens, but of the Latin Colonists.

Hence three species of freed men, the first, Roman Citizens, the second called *Latini Juniani*, the third *Dedititii*. The first had the full rights of marriage, could make wills, enter into contracts. The second could not make wills, nor had the rights of marriage, but could in some measure enter into contracts. The third had none of these rights, nor any chance of improving their condition.

Justinian

hardships which still exist, sufficiently shew the miserable state of the subjected African.

First, It is acknowledged and lamented by Mr. Edwards, that the evidence of a Slave cannot be admitted against a white person, even in cases of the most atrocious injury. What then import laws made to punish tyranny, if the tyrant, by removal of all white witnesses, may with impunity exercise his cruelties upon and in presence of the blacks.

Secondly, In our colonies they are not attached to the soil, in the French they were; hence the resentment of the master can tear the wretch who offends him from the embrace of his wife and family, and sell him again to be transported by some new master perhaps to the mines of Mexico, and the same consequence may follow
from

Justinian took away these distinctions, and retained only this difference between the *Ingenui* and *Libertini*, that while he admitted the latter to the gold ring the former monopolized the right of patronship. There were restraints also laid on masters to prevent improper manumissions. No man could manumit to the prejudice of his creditors, nor could persons under 20 years of age manumit, unless under certain conditions, *viz.* that it should be done by the mode of the wand, in the presence of a number of respectable citizens, as before mentioned, and for just cause. These just causes were, if a minor under that age manumitted

from the imprudence of a spendthrift owner, whose Slaves are dragged to public auction by a sheriff's officer. This practice, sanctioned by a British statute is also marked and reprobated by Mr. Edwards himself.

Thirdly, The consolidated act is peculiar to the Island of Jamaica, where, as well as in Grenada, the condition of Slaves was always more tolerable than in the other islands; but to give energy and effect to that act, some public officer is wanting, OBLIGED to defend the rights of the negroes. Councils of protection have indeed been appointed, but they never can afford such prompt assistance as an individual Attorney, who has no other employment. In this respect, therefore, the French Colonies have the advantage. Their Slaves are attached to the soil, their *Code Noir* is much more forcible than a Colonial Act, such as

mitted his relation, his pedagogue, his nurse or his servant of 17 to be his agent, or his maid in order to marry her; this age of 20, Justinian changed to 17.

If manumissions had been imprudently made by living persons, and required the two laws above mentioned, it is natural to suppose that they were with more frequent imprudence made by will, to prevent which, the law *Falsa Caninia* was made.

I should beg pardon for such a nomenclature of the names of the laws, but those which I do mention occur so frequently in the Justinian code that it is impossible to understand it, without knowing a little their names and subjects.

Modern manumissions have been made by parol or deed of enfranchisement.

the consolidated law of Jamaica, and a King's Attorney was bound to prosecute wherever he heard of abuses. I am sorry to add, that much more pains were taken in giving the slaves a certain degree of religious knowledge, than among our countrymen, which however is attended to, in the above-mentioned law of Jamaica. How far the French Revolution may have improved or vitiated this comparative picture, I am not prepared to say, but on the whole I think enough has appeared to shew, that the preceding observations contain something more than mere declamation.

Lecture the Fourth.

FATHER AND SON.

THE Student of the Laws of England may probably ask, in what respect the subject of the present lecture can be worthy of his attention, or how admit comparison with our municipal constitutions. It is true, the nature and extent of the paternal power at Rome, totally varied from its essence and limits among us, and its sources were there multiplied, as it originated not only in marriage, (its only basis amongst us) but also in legitimation and adoption. But little as it might be expected, its extent has become the foundation of argument and reasoning in our courts, even in this century, and particularly in one celebrated cause (1). And the doctrine of
 legitimation

(1) I mean that respecting the right of educating the children of the heir apparent to the throne, disputed between King Geo. I. and his son, then Prince of Wales, on which occasion the right of the grandfather to take care

legitimation, merits some attention, not only as having been attempted in early times to be intruded upon us, but also as actually being the law in our neighbouring kingdom of Scotland; and the propriety of both this and adoption, is surely a subject worthy of controversy, and inviting to curiosity.

We shall consider,

I. The origin of the Paternal Power.

II. Its extent.

III. The mutual Duties of Father and Son,

IV. How it was dissolved.

The paternal power was acquired by marriage, and birth of children in lawful wedlock.

Secondly, by legitimation.

Thirdly, by adoption.

Of marriage we have treated.

LEGITIMATION.

Legitimation was first introduced by Constantine. Of this there were five modes.

The first was by a subsequent marriage, which rule is followed by the Canon Law, but rejected

of their education, in preference to the father, was *endeavoured* to be supported on the rules of the Civil Law, as transposed into their own writings, by our Bracton and Fleta. See Fortescue's Reports,

by

by ours (2). The Civil Law, however, only allowed subsequent marriage with a concubine, to legitimate the children; the Canon with any one.

The second mode was, by Imperial Rescript. This was introduced by Justinian, because the preceding in some cases could not be used; for instance, where a concubine was dead, or for any other reason, could not be taken to wife.

(2) Of this rejection made so famous by the stern and steady answer of the Barons to the proposal of this rule, we are to find the causes, not in dislike to the particular doctrine, but in general aversion to the introduction of the Civil Law. The Clergy brought it forward in *limine*, as knowing it to be the most palatable and inviting to the Barons, who had great numbers of illegitimate children, but these Feudal Lords saw the invidiousness of the proposal, and rejected a favourite measure, because it might tend to the general introduction of the Civil Law, so favourable in their opinion to the increase of the powers they dreaded, those of the Crown and the Clergy.

Judge Blackstone has supposed many weighty reasons besides, which might have swayed the Barons, and which in his opinion condemn this rule of the Civil and of the Scotch Law; but is there not much cruelty in refusing a power to the parent to make reparation to his injured offspring, and in enabling a younger son thus enriched to brand his indigent elder brother with the name of bastard.

Thirdly,

Thirdly, will. This was not so much a mode of legitimation, as a testamentary declaration, that children were originally legitimate.

Fourth mode, By arrogation (a species of adoption more particularly to be explained in the sequel) for a man might adopt not only the children of another, but also his own illegitimate children.

Fifth mode, *Per dationem curiæ*. To explain this, we must know that the office of Decurion, as it was called at Rome, was an office of honor indeed, but of much labour and trouble, as well as of expence in giving public spectacles, &c. The *Datio Curie* was making men subject to this office; in consequence they could not reside out of their town or borough, but were, as may be said, Slaves of their little *Curia* or Senate, in their *municipium*. *Curie adscribebantur, ei inserviebant periculo suarum facultatum*; it is no wonder that men were not ambitious of such splendid Slavery, and must be enticed to it by such rewards as legitimation.

It must not however be conceived, that legitimation was always a benefit; the effect of legitimation was undoubtedly, at least in the case of a subsequent marriage, a right of succession to paternal property, but as it also reduced the subject of it under the paternal power, it might possibly, as will be more fully seen hereafter, also
operate

operate as a disadvantage, and therefore persons could not be legitimated without their own consent.

Illegitimate children were of four kinds.

First, those born of a concubine, widow, or virgin *Stuprata*, called *natural children* or *Nothi*.

Secondly, the children of a harlot, called *spurious*, or *vulgo quæfiti*.

Thirdly, children of an adulteress.

Fourthly, children of an incestuous marriage.

The first order only, viz. natural children could be legitimated, for legitimation implies the fiction at least of a marriage; and in the second case there was confessedly no marriage; in the third and fourth there could not be one by law.

Illegitimate children were not under the paternal power, but they were not infamous; the natural were capable of holding any honors; the spurious were undoubtedly by the people somewhat contemned, but not rendered infamous by the laws (3).

ADOPTION.

(3) The spurious did not bear a father's name, the father being uncertain. Cæsar's son by Cleopatra, formed an extraordinary exception, for which Anthony reproached him. S. P. F. in Roman inscriptions, sometimes means *Sine Patre Filius*. The Civil Law as well as ours, empowered the confinement of the pregnant widow, to prevent

A D O P T I O N (4).

This remarkable custom, (which my Lord Coke says was never introduced into England) was not unknown to the Greeks, as also to the Assyrians, Ægyptians and Hebrews.

The feelings of mankind naturally suggested this resource of orbity, and declining unsupported age looked abroad for that staff which was denied to it at home, but its uncommon and extraordi-

vent supposititious births, and the rule we have formerly mentioned forbidding a second marriage within a year from the death of a former husband, *infra annum luctus*, was made to prevent disputes about the real father; this latter rule also prevailed in England until the end of the Danish Government. If husband not heard of, woman might marry again after five years, till Justinian required positive proof of his death; with us seven years save the felony.

(4) It is not unusual we all know, even among us, for friendship to adopt in effect, the children of strangers in blood; but here is the plain difference, between such acts of friendship, and the legal adoption of the Romans; the friend and intended benefactor may change his mind when he pleases, but the adopted child at Rome obtained by the adoption legal rights of inheritance and succession to the adoptor, of which he could not be arbitrarily or wantonly dispossessed.

nary

nary prevalence at Rome requires some further investigation of its peculiar causes in that state. First, it was thought disgraceful not to keep up and preserve the domestic Gods, and sacred things of the family. Secondly, the rewards offered to the fathers of families, and the penalties on orbity, made men eager for children, and adopted children answered the purpose. Thus the candidates for honors adopted sons, in order to have the *jus trium liberorum*, tho' very often as soon as they had obtained those honors, they got rid of these fictitious children, by emancipating them, until this trick was stopped by a decree of the Senate, mentioned by Tacitus.

Thirdly, a third reason for adoption was to get admission into the plebeian offices, *e. g.* the Tribuneship, and this did Publius Clodius.

The persons to be adopted might either be persons in their own power, or persons already in the power of another parent; in the former case it was Arrogation (5).

(5) They were therefore thus defined, *Adoptio, est actus sollemnis, quâ in locum filii vel nepotis, adsciscitur is, qui natura talis non est, vel adoptio est actus legis quâ liberos qui in potestate parentum sunt, adoptamus imperio magistratus.*

Adrogatio, est actus quo homo sui juris auctoritate summi imperantis, in patriam alterius potestatem redigitur.

Who might adopt, or be adopted—Those only who could have been parents, and have had children in their power could adopt, therefore eunuchs could not, nor infants, nor women, unless by special licence from the Prince. Younger persons could not adopt their senior, but the adopter must have been 18 years older than his adopted son—36 than his adopted grand-son, even if they were thus qualified; still they must have been persons who wanted this solace of old age, therefore if they were still capable of having children, (and all persons under 60 were supposed capable) or if they had already natural children, they were not entitled to this indulgence without particular licence. The consent both of the adopted child and of the natural father must be obtained; lastly no man could adopt a grand-son without the consent of his son if he had one, for he was not to force an heir upon his son; nor could illegitimate children be adopted; so that adoption was much more limited in Rome, than is I believe generally imagined.

Arrogation was still more so, for it was confined to adults, because the consent of the person arrogated was necessary. Antoninus Pius indeed permitted the arrogation of persons under the age of puberty, but not without the consent of relations, or of guardians, and an examination whether the
arrogation

arrogation was for the advantage of the minor. He added these further conditions, that if the arrogated died before puberty, his goods (6) should go in the same succession as if he had never been arrogated; and if his father emancipated him without cause, he was to restore to him all his property, and to bequeath to him moreover a fourth part of his own. Besides these restrictions, none but Roman citizens could arrogate, and that only at Rome—the tutor could not arrogate his pupil, and neither woman nor foreigner could be arrogated, but women might be adopted.

Form of adoption—Adoption was done before a magistrate, but might be done any where; the rite of adoption consisted in three sales from the natural father to the adopter, *per æs & libram*, in the presence of the balance holder, the antestatus and five witnesses, ceremonies much resembling those which attended the making of wills among the Romans (7). There was another mode of adoption,

(6) Goods, *Bona*, in the Civil Law mean all a man's estates and property, not merely chattels as with us.

(7) This form of adoption we find in Suetonius, when Augustus adopted Caius and Lucius.

Heineccius makes a question whether solemn adoption would not to this day be valid in Germany; something

adoption, viz. by testament, but this could scarcely be called so in strictness, since it did not reduce the devisee under the power of the adopter; it was rather a conditional bequest of the inheritance, on condition of bearing the testators family and name; hence to acquire other rights, a regular adoption was necessary: thus we find that Augustus, tho' adopted by Julius's will, took care to have it confirmed by a law; and Tiberius, tho' directed by will to bear Augustus's name, yet after the death of Caius and Lucius Cæsar, was by Augustus regularly arrogated,

Form of Arrogation—Arrogation was a much more public act than adoption; it was always done in the *Comitia Curiata*, because it was considered as a matter concerning the people (8), and to be to them referred; the reasons of so considering it, and insisting upon its notoriety were these; as the right of inheritance was to be transferred, it ought to be public to prevent frauds upon lawful heirs, and besides as the name of the person arrogated, was struck out of the tables of the Census, and he reduced under the power of another, this

like adoption is frequent in that country, viz. the putting step-children on a par with own children by the decree of a magistrate,

(8) It derived its name from the *Rogatione ad populum lata*.

was

was not to be done without the consent of the people. The Pontifices took care that the person arrogated should not be imposed upon, or do any act to his disadvantage, and examined whether the arrogator was entitled to this privilege; this done, the votes of the people were taken. In later times the Emperors took upon themselves, more especially as they were *Pontifices Maximi*, to arrogate by imperial rescript.

Effects of Arrogation and Adoption—Both brought the party, until Justinian's time, under paternal power of their new father, gave a right to his name, to a participation of his sacred things and rites, and right of inheritance (9); but while the adopted child thus became entitled to the property of his assumed parent, he lost all claim to that of his natural father; he was also raised or depressed into the rank which his new father held (10). Justinian gave a mighty blow to adoption, by giving the adopted all the rights of sons, without the adoptor having the paternal power, unless he was a person in the ascending line, adopting a descendant, for it was not unusual for a grand-father to adopt a grand-son.

Paternal

(9) At least of succeeding to the *Agnati*.

(10) Thus Livy mentions that Cornelius Cossus was elected Military Tribune with Consular power, at a time when

Paternal Power—Duties of Father and Son.

By the Twelve Tables, the father had a power of life and death over the son, of scourging, imprisonment, and sending in bonds to country labour, and even if necessitated by hunger, of selling and mortgaging him (11); but this power was restrained by the Imperial Constitutions, and by custom and judicial interventions at earlier periods, and parents severely punished that put their children to death, no power being left to them

when this office was not open to plebeians, which privilege he obtained by being adopted out of the Licinian which was a Plebeian, into the Cornelian, a Patrician family.

(11) The power of a Roman father over his child was peculiar to that state. Dion. Halyc. has proved that the Greeks knew no such thing, at least not in the same degree, nor the Persians, tho' the latter exercised a very austere authority over their children, for a father's power by the Mosaic Law, see Deuteronomy, ch. 21. This power originated in a law of Romulus, tho' admitted into the Twelve Tables as an ancient custom; but all the laws of the Kings which were retained, were retained as old customs, not as Regal Laws, *ex odio insigni regii nominis*, the father did not punish however without trial, it was in reality a domestic court.

but

but that of moderate correction, and disinheri-
tance for *cause expressed*, and this paternal power did not
cease with the minority of the son, he could not
sue the father, nor any one else without the father's
consent ; no action lay against him while under
the paternal power, but must be brought against
the father ; whatever he acquired, he acquired to
the father's advantage ; there could be no civil
obligation contracted between him and the father,
for they were as one person ; he could not marry
without the father's consent, nor without his ap-
probation make a *donatio mortis causa*, nor a will
even with his father's consent, except of such
property as he got in the wars, called his *pecu-
lium castrense* ; with respect to the father they
were considered as *things* not as *persons*, but with
respect to others as persons, herein differing from
slaves who were regarded as *things* in whatever
light considered ; as long as the law allowed him
a power of selling them, he might do so three
times, so that if manumitted by the buyer, they
would twice fall back into his hands, which is
worthy of observation because it accounts for
some of the Roman forms of emancipation, &c.
These extravagant powers could not have been
congenial to an arbitrary monarchy, and accord-
ingly we find them gradually diminished by the
intervention

intervention of the Emperors (12). There was no maternal power, because she also was in the power of her husband (13), this power continued during

(12) Trajan emancipated a son that was cruelly treated by his father, and deprived the father of the son's property. Adrian banished a father who killed his son in the chase on suspicion of adultery. At length, by Valentinian, the power of trying the offence of a son was entirely transferred to the magistrate. Sons were put to death with impunity down to the time of Augustus.

Constantine permitted, on account of extreme poverty, to sell their children when just born, but he did this to prevent their being exposed or murdered; and to prevent the necessity, instituted poor laws.

With respect to childrens' acquisitions, the privilege of reserving whatever they gained by military service was at length extended to every adventitious gain of theirs, such as a bequest or a salary.

(13) The English and Irish laws give the father only a moderate power of correction and restraint until the age of 21, which he may in part transfer to a tutor or school-master. His duties to them are protection, education and maintenance, until able to maintain themselves; when able to work if the parent maintains them, that parent is entitled to the profits of their labours, but has no power over their estates, (if they have any) further than as guardian or trustee, and must account for the property when they come of age. A mother is entitled to no power, but only to reverence and respect. In *England*, by the poor

during the life of the son, and did not cease even on his arriving at the highest honours, some very particular ones excepted, for which see Novels 81. ch. 1. such as the consular dignity, or being made a bishop; but while in publick office his duties to the public naturally abated and interrupted a little the father's authority; the father was bound to educate the son according to his ability, and to support and protect his children, and also his grandchildren: the child if he had a separate property or peculium, was to support the father if necessary, and bail him if imprisoned, but was not otherwise obliged to pay his debts; a man was obliged by law also to relieve his poor brothers and sisters, but not more distant relations (14).

The paternal power was dissolved by the natural or civil death of the father or by emancipation (15).

Emancipation

poor laws, peculiar obligations are imposed. The Civil Law did not oblige a father to maintain the offspring of an incestuous marriage, tho' it imposed the reciprocal duty on the child. The canon law and ours do not dissolve the parent's obligation in any case.

(14) A law much resembling that of China. Lord Macartney's Embassy. chap. 4. vol. 2.

(15) The civil death was by deportation, relegation, or becoming a slave of punishment, terms occurring sufficiently often in the classics to deserve distinction. Deportation was a perpetual banishment, depriving the banished of the rights of a citizen. Relegation might be

Emancipation ; a sound so pleasing to modern ears, did often at Rome convey a very different meaning ; the child, tho' freed from the parental power, lost the right of succession to the parental estate ; it was to him frequently a sound of woe and of disinheritance ; he therefore could not be emancipated against his own consent, but for sufficient cause, nor refuse to be emancipated if the father shewed sufficient reasons ; on the other hand, where emancipation was desirable, he could not force it, except for just cause, such as immoderate cruelty.

The party coveting it had to labour through not only his father's but his grandfather's chains ; First, if the grandfather was living, the father and the son were in the power of the grandfather, and the father had not this special power over his own son, till the death of the grandfather, because

perpetual or temporary, but did not destroy the rights of citizenship. The slaves of punishment were those condemned to the mines or sentenced to be destroyed by wild beasts. The parent taken prisoner did not lose the parental power, it was only in suspense till his return ; he who returned from captivity was supposed never to have been absent, by a fiction called *jus postliminii*. Relegation differed from exile, for the exile was deprived of the

because the father himself was a dependant (16). The grandfather might even emancipate the son and retain the grandson in subjection; and vice versa, his emancipated grandson would, upon his death, fall back under the father's dominion; such and so extensive was the slavery of children in that region of boasted liberty. Even mar-

the rights of citizenship, hence Ovid. Trist. 2. Ipse relegatus non exul dicor; see also Livy, lib. 4. ch. 4; men were driven from their country by the interdiction of water and fire, for no man could *directly* be forced into exile, but only by the circuitous method of forbidding to him the necessaries of life. The French in their ridiculous affectation of similarity to the Romans, have of late studiously used the terms of deportation, &c. &c.

(16) Upon doctrines like these were founded the positions in our ancient books, relied upon by the Advocates for King George I. in the famous contest beforementioned between his Majesty and the then Prince of Wales, about the education of the Prince's children.

The son of a daughter was not in the grandfather's power by the Civil Law; nor with us, says Co. L. 84. 6.

The Court of Chancery has often interfered with and controuled the parental power. Vide 2 Brown. Ch. Cas. and 4 Brown, ditto, so the courts of law by Habeas Corpus.

A child has been taken from a grandfather and put under a mother's power, Mellish and Da Costa. 2. Atkyns. 14.

riage did not emancipate the daughter, tho' she owed her husband reverence, and was obliged to work for him. But to dwell longer on this obsolete subject would be as tedious as useless, I therefore omit a description of the form of emancipation, further observing only, that 10 years non usage made the son free, without any form (17), and that the practice of fathers putting their children to death is admitted to have taken place, at so late a period as the time of Augustus.

(17) In Justinian's time it was done by a simple declaration before a magistrate. Tho' the son by emancipation lost all strictly legal right to the paternal estate, yet he soon by the Prætorian power was enabled to enforce his equitable claims, and the father succeeded to the estate of an emancipated son, tho' not as father yet as patron. The privileges so often alluded to on account of number of children called usually the *jus trium liberorum*, (tho' five were requisite to give them in the provinces and four in Italy out of Rome) were excuse from guardianship, preference among candidates, precedence in office, and an immunity from all personal duties.

Lecture the Fifth.

GUARDIAN AND WARD.

WE have now traversed the two least useful and most obsolete departments of the Civil Law, and shall for the future tread on more fruitful ground. Their law of guardianship, tho' in many respects different from ours, seems to have afforded many useful hints, which were accepted by our early jurisprudence.

Minority at Rome did not cease till 25, and as education is a publick concern, guardianship was made a public duty, which no man could refuse without sufficient excuse, under pain of heavy fine (1).

Guardians were appointed not only to infants, but to idiots, lunaticks, women, and even prodigals.

(1) This compulsion, and the different period for full age, are the great distinctions between the Roman guardianship and ours.

The

The magistrates (2), either assigned the guardian or confirmed the one appointed by the individual or by the law.

The guardian was either a tutor or a curator; the tutor had the charge of the person, the curator of the fortune of the ward. Such is the sense in which these words are understood by Mr. Blackstone, and certainly is their meaning in our spiritual courts, but they frequently and I think most usually mean, in the Civil Law, the tutor a guardian till puberty (3), the curator from thence to 25; the first appointed for the minor, the latter chosen by him.

Guardians were (as with us) sometimes appointed by the will of the father, sometimes by the disposition of law, and sometimes by the office of the magistrate, and were accordingly stiled Testamentary, Legal, or Dative (4).

Testamentary

(2) These magistrates were the consuls in the time of Claudius. Pliny says, he was thus appointed in Trajans time. Plin. Epist. ix. 13. Antoninus gave the appointment to the prætors only.

(3) *i. e.* Till 14 in the man—12 in the woman.

(4) The series of guardians known to our law, has been thus neatly epitomized by Mr. Fonblanque.

First, *Jure naturæ*, the father of his heir apparent, till 21.

Secondly,

Testamentary guardians could only be appointed to children or grandchildren under puberty.

Secondly, *In focage*, the next of kin to whom the lands could not descend, and this was only till 14, and of things that lie in tenure.

Thirdly, By the statute (14 & 15 Ch. II. ch. 19. in Ireland) the appointee in a father's will. This extends to all the minors estates, and may be till 21 or any less time.

Fourthly, By custom.

Fifthly, The person appointed by the spiritual court, of personal estate only.

Sixthly, The King, for allegiance and protection are reciprocal. Thus far Mr. Fonblanque.

The restriction on the guardian in focage, that he cannot be a possible heir, is the great triumph of the common lawyers, who say, that the Civil Law by a contrary regulation *agnum lupo committit*; a triumph however, which Lord Macclesfield, 2 P. Wms. 262. said, was worthy only of a nation yet uncivilized. Solon however was of the same opinion with the English lawyers—Lycurgus with the Roman. Charondas separated the care of the person and estate, giving that of the latter to the next heir. Many causes induce applications to the Spiritual Court to be appointed tutor or curator, E. G. where a deceased person has left children under age, and no person willing or legally entitled to administer, it may be necessary for some friend to be appointed curator in

berty, in the power of the appointer and being his natural heirs; they might to posthumous children who were deemed already born as to every thing that respects their advantage.

If however a mother or patron or other person after having devised their property appointed by will a guardian to the devisee, tho' the appointment was not good in strictness of law, yet upon application to the proper magistrates, it was confirmed unless cause, and so even in case of a son previously emancipated. And if there was any defect in a parent's appointment, where the intention was clear, the magistrate was ready to supply the deficiency.

Legal guardians. If there was no testamentary tutor or guardian, the *legal* stepped in of course.

So

in the Spiritual Court, in order to lay a ground for applying for administration.

A testamentary guardian must by the statute, enter into recognizance in Chancery for the faithful execution of his trust. Chancery can check and punish offences in guardians; upon bill, if the minors are not wards of Chancery, upon petition or motion if they are; wards of Chancery are E. G. those whose guardians are appointed by the Chancellor, or whose estates are trust estates in settlement. Chancery can remove guardians for breach of trust or appoint others. The power of appointing a testamentary guardian is not extended by the statute to mother or grandfather. Where minors, not wards of Chancery, Guardians may be proceeded against by information, 2 P. Wms. 562.

So if the testamentary died, or was a temporary or conditional one, he was succeeded by the appointee of the law. The legal tutor was of four kinds.

First, The next heir.—A rule as we have observed before so much and so unjustly condemned by the English lawyers; (5) if there were several relations equal in degree, a joint guardianship (6) was granted with benefit of survivorship, but if the first guardian or guardians were dead, they were not succeeded by their next of kin, but by a new guardian appointed by the magistrate (7). The mother or grandmother were however sometimes preferred to the next male heir.

Secondly, The patron.—The patron was the natural heir of the slave, who was made free; he was obliged therefore to undertake the guardianship of the freed person of a minor, be-

(5) To this may be compared our guardian in focage.

(6) With us of those of equal degrees, the eldest will be preferred as guardian. 1 Instit. 88.

(7) With us, if before a minor arrives at 14 guardian in focage dies, the guardianship shall not go to an executor, but to the wards next of kin. Pl. 294.

cause as he reaped advantage, he was also to bear inconvenience (8).

Thirdly, the Parent.—If the child was manumitted while a minor, the Parent became his legal guardian (9).

Fourthly, the fiduciary Tutor or Guardian.—This was the son of a deceased parent, who had manumitted his children or grandchildren, and so as in the preceding case had become their legitimate guardian. On such parent's death, his son became fiduciary tutor, both to his brother's and brother's children, and to his own, if they had been emancipated by the grandfather.

The legitimate and dative tutor took an oath nearly resembling that of our executors and administrators, to administer faithfully and to render a just account when required: they also were obliged to give security and to make an inventory of the minor's effects to be attested by a public notary and other witnesses; besides, all their effects were tacitly pledged for the due execution of their trust.

(8) To this may be compared the guardianship of old vested by our laws in the Lords of Manors.

(9) As with us he is guardian by nature and for nurture.

Justinian

Justinian ordained, that where the property did not exceed 500 solidi the inferior magistrates in the provinces, together with the bishop, might appoint guardians (10).

The duty of a guardian nearly approached to that of a father; (11) he was bound to take care of the

(10) Code 1. Tit. 4. De Episcopali Audientia. Mr. Hargrave disputes the rightful origin of the power of the modern Chancellor, to appoint guardians to infants. Mr. Fonblanque vehemently supports it. It is astonishing that neither of them has observed how naturally this power was suggested by that of his prototype and model, the Roman Prætor, as that of the Ecclesiastical Courts to appoint Curators, was by the above mentioned power given by Justinian to Bishops. Such a power, tho' not given by special commission in Ireland any more than in England as to minors, as it is with respect to idiots and lunatics, cannot now be doubted, and indeed the extreme care of minors and vigilant enforcement of the duty of guardians, which has of late years done so much honour to the Chancery of Ireland, would make it a melancholy question, if it could.

(11) For the English law respecting duties and powers of guardians, see among others particularly the cases of *Dagley v. Tolfeny*, 1 P. Wil. 283. *Duke of Beaufort v. Berty*, 1 P. Wil. 702. *Goodall v. Harris*, 2 P. Wil. 560. *Palmer v. Danby*, Prec. in Chan. 137. *Wray v. Williams*,

the ward's person and estate, as far as a careful and diligent father would, and to lend his authority when necessary; as to the first, he was to take care that the ward was properly educated according to his quality, either at his mother's house, if he had one, until she married a second husband, or in some other suitable place, to be judged of if necessary by the Prætor. Testamentary guardians or those appointed by the magistrate upon inquisition had already received an approbation, and were not to be doubted.

The guardian was not to alienate lands or moveables of the minors of any considerable value without the decree of a magistrate; he might sell things perishable, but ought not to be a purchaser himself except at open auction (12); he received debts due to, and paid debts due by the

v. Williams, Prec. in Chan. 151. Ward v. S. Paul, 2 Brown, 583.

The act of a guardian where a reasonable one, is as valid as if done by the infant at full age, otherwise if wantonly done, without any real benefit to the infant, *Pierfon v. Shore*. 1 Atkyn's, 480.

(12) Lord Hardwick said it was improper for a guardian to purchase his ward's estate immediately on his coming of age, but if he paid the full consideration, it could not be set aside. *Oldin v. Samborne*. 2 Atkins, 15.

minor

minor (13); he was not to let the minor's money lie dead, but to employ it to use: if he did not, it was presumed that he used it himself (14), and he was liable to interest: this was the law by the Digest, tho' afterwards altered by the Code; he was not to suffer by accidents (15), but if he brought vexatious actions knowingly, the loss must fall upon him; he could not give up any rights of the minor (16); if he advanced his own money in defending them, he was entitled to interest (17.) At the minor's age of 25, his authority ceased.

(13) Guardian may without the direction of a Court of Equity, pay off a mortgage or the interest of any other real incumbrance. *Prec. in Chan*, 137.

(14) By the law of England he is not obliged to put out at interest the minor's money, without the authority of Chancery, and if he does, it is at his own risk; but as he must account annually in Chancery, if he neglects to do so, and thereby to empower the the Court to put out the money, he may be charged with interest.

(15) He is not to suffer by accidents. 8 Co. 84.

He shall have allowance of all reasonable expences. Co. L. 89.

Guardian must keep down the interest of a mortgage out of the profits. 2. P. Ws. 279.

(16) Infants answer by his guardian, no evidence against him. *Carthew* 79. 3 P. Wms. 238.

(17) At 25 full age was attained, and untill 46 every person was deemed and stiled young, a comfortable rule for those who do not like to be thought old.

The

The minor could do no act legally without the approbation and authority of his tutor ; he might indeed receive gifts, but he could not enter into contracts : if he did, he was not bound thereby, altho' others might be bound to him. But if he took upon himself to contract, and therein gained advantage by fraud or deceit, he was bound. So if being in partnership his partner laid out money, and thus improved the common stock, he was bound to advance his proportion (18). In all other cases the confirming authority and interposition of his guardian was absolutely necessary. He could not be an instrument in the transfer of property, either by alienating his estate, or borrowing (19) or lending money, nay not even by
paying

(18) With us he may go in debt for necessaries, without the authority of his guardian. So for instruction ; may convey as trustee or mortgagee, under the authority of the court ; if seised of an advowson, church must be filled ; but he cannot go into trade or partnership. He may contract without his tutor's authority, and his contract is not void as at Rome, but voidable on his coming of age, but there is a likeness to the Roman *auctoritas tutorum* in the necessity of suing and being sued by his guardian.

(19) The *Senatus consultum Macedonicum*, which forbad any action or demand on account of a loan to
Minors;

paying it, for the law went so far as to say, that if he paid a debt without the authority of his guardians, it was no payment or discharge. His estate, tho' it could not be alienated by himself or guardian might be sold by a creditor to satisfy a mortgage debt; he might indeed, when of age, confirm a sale made during minority, either by express words or tacit acquiescence for 5 years from that period (20). Any controversies touching the estate of the minor were to be postponed to his age of puberty (21). Guardian could not be called to an account till his guardianship expired (22), but of course might account if he pleased; these provisions are found in 1st. Book Inst. and 26 and 27 Dig.

Curators.—When the minor arrived at 14, he was freed from tutorship, but might take a guar-

Minors even after their Fathers death, has been particularly introduced to our notice by Lord Hardwicke, in the remarkable case of Lord Chesterfield, v. Janßen, 2. Vesey, 125. this decree took its name from Macedo, a famous Usurer.

(20) Four by the Scotch law.

(21) i. e. In the language of our law the parol demurred.

(22) With us he may by means of a prochein amy; nay it is said that any person may call a Father to an account. 2 P. Wil. 119.

dian

dian till 25, called a curator, and latterly was obliged to do so. Curators were also appointed to ideots, lunatics, prodigals and women. Also to take care of the estate of a lurking debtor—of a prisoner of war, or an heir in utero. (23)

Persons forbidden to be guardians were the debtors or creditors of the minor—persons deaf, dumb and blind—a father-in-law,—prodigals—women, except the mother or grandmother,—and those who appeared to seek it, whose eagerness was justly suspected (24).

Legal excuses were age, viz. 70 years—*ius liberorum*—employment in the revenue—absence on account of the Commonwealth—poverty—want of skill—profession of the liberal arts—and, holy orders. See 1 Book Inst. de susp. & excus. tutoribus. Also 5th Book of the Code.

(23) Men of 20 of excellent character and women even of 18 when of exemplary prudence, were often excused from having guardians by special privilege, and latterly the custom of assigning guardians to women fell entirely into disuse. Lord Hardwicke seems to intimate an opinion in the case already quoted, relative to an improvident bargain made by the famous Mr. John Spencer, that the want of the Roman law of Curators to noted prodigals, has established that trade of annuities and post obits, so universally exclaimed against. 2 Vesey 129.

(24) If a mother when guardian, married a second husband, before she passed her accounts, his estate stood a security to the minor. Code 8. 18. 6.

Lecture the Sixth.

CORPORATIONS.

HAVING discussed the rights and duties of natural persons, we proceed to artificial, which are called Bodies Politic, or Corporations. The necessity of such bodies is evident whenever rights ought to be continued beyond the lives of the persons possessed of them. That rights should in this manner survive must be often requisite to the good of the public, and the most easy and convenient way of keeping them alive is by the creation of such artificial persons, a kind of intellectual bodies, consisting of individual members, but in the abstract distinguished from them ; all the individuals that have, that do, and that shall compose the Corporation make but one person in law, and that a person endued with immortality.

The convenience and necessity of such institutions, produced them at Rome so early as the

A a

reign

reign of Numa (1). They were called Colleges or Universities, names there applicable to all kinds of Corporations, for whatever purposes created, (and even to voluntary societies) but which in modern times have been more usually confined to those instituted for the education of youth and the advancement of learning.

The Civil Law divided Corporations into Ecclesiastical and Lay, into Civil and Eleemosynary; but the distinction into aggregate and sole was unknown to them (2); all their Corporations were aggregate, and three were always necessary to form a Corporation (3). It was essential, as it is with us, that the Corporation should have a name, for how could it sue or be sued, or perform any of its functions without a name, which is the very bond and link that ties together the combination.

I shall now consider how Corporations were created.

Secondly,

(1) J. Blackstone gives the honor of the invention to Rome, Dr. Ayliffe to Athens and to Solon: the latter I think is right, and the Pandects seem to confess it, 47. 22. 4.

(2) *Sole* Corporations consisting of one person and his successors, are entirely the invention of modern times.

(3) By the Canon Law two might make a Corporation. Corporations are by our law divided into sole and aggregate

Secondly, their powers, capacities and incapacities.

Thirdly, how dissolved.

Corporations were formed, as appears to me, by the permission or grant of the Prince (4), or at least by a decree of the Senate at Rome, in which respect I have ventured to differ, with deference, from Mr. Justice Blackstone, who says, that the Civil Law differed from ours, in as much
as

gate, Ecclesiastical and Lay, Civil and Eleemosynary. Universities, says Blackstone, are Civil, not Eleemosynary, for the stipends are not mere donations, but payments for work and labour done, but the Colleges in Universities says he, are Eleemosynary; *now why does not the same reason extend to single Colleges.*

(4) In England and Ireland the King's consent, either expressly or impliedly given is necessary to the creation of any Corporation, and I am the more emboldened in advancing the opinion in opposition to Judge Blackstone, *that the Civil Law does not differ from ours in this respect*, because by using the word *seems* he appears not to have formed a decisive opinion. The King's consent with us is impliedly given in the case of such Corporations as exist by Common Law, and are so *virtute officii*, such as Bishops and Parsons, or have existed time out of memory, such as the Corporations of ancient cities. To the existence of these Corporations former Kings are supposed to have given their concurrence, tho' by lapse of time no traces

as by it Corporations, says he, *seem* to have been erected by the mere act and voluntary association of the members, provided such convention was not contrary to law, for then it was an unlawful College; it does not appear, says he, that the Prince's consent was necessary to be actually given to the foundation of them, but merely that the original founders of these voluntary friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state. Now this is true of common mercantile partnerships, or of temporary societies, formed for the interests of particular persons, and to continue during their lives; but as to public and permanent communities, intended to be perpetual like our Corporations, they appear to me to have been always confirmed by decree of the Senate, or by the Imperial Constitutions; thus Dig. 3. 4. 1. mentions the Corpora-

of such exercise of the Royal Authority now remain. This power of erecting Corporations may be granted by the King to another, for *qui facit per alium, facit per se*, his subject is but the instrument. The Chancellor of Oxford has such a power; these positions are not meant to contradict the power of the three estates to erect a Corporation by Act of Parliament; but then the King is a party, and the charter or letters patent still usually proceed from him alone.

tion

tions
thus c
expres
nisi ea
coierit,
the gr
leges,
the go
disper
bills, v
of the

The
poratio
own.

Fir
its ver
ing ne

Seco
son mi
but co
lands v
just ca

(5)
reditate
instituen
our stat

tions of Bakers, and of Pilots to have been thus confirmed, and Dig. 47. lib. 22. 3. says expressly, that every Corporation is illegal, *nisi ea vel Senatus Consulti auctoritate vel Caesaris coierit*, and I am confirmed in this opinion by the great care taken to prevent unlawful Colleges, *i. e.* illegal meetings or associations, which the governors in the provinces were empowered to disperse, by powers something like our convention bills, with particular injunctions respecting those of the soldiery. see Dig. lib. 47. tit. 22.

The powers, capacities and incapacities of Corporations in the Civil Law much resemble our own.

First, The Corporation thus established, from its very end and nature acquired a power of electing new members to replenish vacancies.

Secondly, The Corporation like a private person might contract, sue and be sued, might grant, but could not purchase or receive donations of lands without a licence (5), nor alienate without just cause.

Thirdly,

(5) *Collegium si nullo speciali privilegio subnixum sit, hereditatem capere non posse dubium non est, lib. 8. code de hæred. instituen.* Their law therefore in general corresponded with our statutes of mortmain, of which it seems incumbent here

Thirdly, They were allowed to hold estates, the common property of the Corporation, to have a common chest, and I suppose a common seal, or something in the nature of it, or else it is not easily conceived how its will was properly signified, but of this I have found no express mention.

Fourthly,

here to give a short account, and yet our mortmain acts have always been ascribed to the principles of the Feudal System, because alienations to corporate bodies deprived the Feudal Lord of his chance of escheats, since such tenants could neither be attainted or die: and of his military services, if the grantees were of a religious fraternity.

The mortmain acts render void all gifts, grants and alienations of lands or tenements to any Corporation whatsoever, without licence from the King, and even this is not always sufficient; the principal of these having been made before the reign of Henry VIII. (until whose reign the power of willing was not general) did not affect devises by will. In the statute of wills, therefore Corporate Bodies are expressly excepted; that statute is in this country, 10 Car. I. Sess. 2. ch. 2. but in England 32 H. VIII. The 43d of Eliz. empowered devises to Corporations for charitable uses; the corresponding statute in Ireland is 10 Car. I. sess. 3. ch. 1. and confines itself to Archbishops and Bishops. The English act 9 Geo. 2. ch. 36. limits very much *their* statute of charitable uses, confining

Fourthly, They might make bye-laws for the administration of their own affairs, provided they were not contrary to the several laws of the Empire,

confining the power of granting for such purposes to an execution by deed indented, with two witnesses, made twelve months before the death of the donor, and enrolled in Chancery, with an exemption for the two Universities, confining however the latter to the purchase of not more advowsons than are equal in number to a moiety of their Fellows. An act similar to this of 9 Geo. 2. was never passed in this kingdom.

With respect to devises to Corporations by will avoided by the statute of wills, it has been a great question, whether the lands or tenements so forfeited would be forfeited to the Crown, or would revert to the heir; a question started in a notable case relative to a bequest to the College of Dublin, of which a note shall be given in the Appendix.

A method was introduced in times of Popery, of evading the statutes of mortmain by granting for superstitious uses, tho' not directly by name to Corporate Bodies, as for obits, chantries, &c. This has been rendered illegal by statute, both in England and Ireland, but they must be entirely distinguished from charitable uses, such as for the maintenance of a school or an hospital. It is not within the compass of this work, to enumerate the well-known various efforts of Ecclesiastical ingenuity to evade the statutes of mortmain, to these efforts however we have been obliged for the doctrine of uses and trusts, and of common recoveries.

pire, or their own private original constitution. The existence of this power, tho' there have been sharp controversies among Civilians upon it, is certain, and always inherent in all Corporations.

As to their disabilities they must act by a Syndic, as with us by an Attorney, being an invisible body existing only in intendment of law, and for the misbehaviour of the Body Corporate its governors only were to be answerable in their personal capacities, for instance, it could not as a body be guilty of treason or forfeit therefor, and in these respects our laws agree. Corporal injuries it cannot receive, being intangible, but it may be injured by libels, and punish them in its Corporate capacity. It could not be outlawed, nor excommunicated, any more than with us; for says Sir Edw. Coke, without intending to laugh, it has no soul.

Among other inferior incidents, one naturally offers itself to our enquiry, viz. How many votes or what majority of a community bound the rest. Mr. Justice Blackstone says, the act of two thirds was considered as the act of the whole, whereas with us *any* majority will do. Mr. Wood and Bishop Halifax are of the same opinion. My reasons for differing, and thinking that the act of

any

any majority was considered as the act of the whole, are contained in the note beneath (6).

(6) I have already noticed one error of Mr. Justice Blackstone, as to Corporations, here seems to be another. The writers above mentioned refer to but one authority, viz. 3 lib. Dig. ti. 4. c. 3. Now if it were consistent with our just reverence for them, or possible to doubt their industry, we might be almost tempted to imagine they never looked at the original, which is *nulli permittitur nomine civitatis vel curiæ experiri, nisi ei cui lex permittit, aut lege cessante ordo dedit, cum duæ partes adessent, aut amplius quam duæ*. The chapter or title is upon the appointment of a Syndic or Attorney by a Corporation, the paragraph relates merely to that one case, and requires not the assent, but merely the presence of two thirds: Now compare with this the two following authorities which they have not mentioned, *Refertur ad Universos, quod fit per majorem partem*, 50 lib. Dig. 17. 160. & *decreta quæ non legitimo numero decurionum coacta facta sunt non valent, lege autem municipali cavetur, ut ordo non aliter habeatur, quam duabus partibus adhibitis*, Dig. lib. 50. tit 9. 2. 3. *de decretis ab ordine faciendis*. The former authority speaks universally; the latter, tho' said particularly of municipalities, is universal in its principle. I do not deny that the presence of two thirds or more was necessary, but the voice of the majority of that number so present, operated as the voice of the whole.

So again, *Quod major pars Curia effecerit, pro ea habetur, ac si omnes egerint*, lib. 19. Dig. *ad municipia*.

B b

Corporations

Corporations were dissolved at Rome by the Prince, by deaths, by surrender, by forfeiture. So with us, Corporations may be dissolved by act of Parliament, whose power is said to know no limits, but is on them very sparingly and cautiously exercised—by death of all the members, vacancies not having been filled up, which is a case extremely improbable—by surrender of its rights, which Corporations will seldom think of doing, and seldom could, without betraying their trust (7). By forfeiture in consequence of some of their franchises, rights, privileges or duties being neglected or abused; but as such causes of forfeiture in general are trifling, and cannot be taken advantage of; but by extreme strictness, or *summum jus*, and have when insisted on usually arisen from sinister or arbitrary views in government, proceedings to vacate charters, on account of such forfeitures, have been, and are deservedly odious. The arbitrary proceedings in the time of the Stuarts to abrogate the Charters of the City of London and other Corporations, from whom they found a determined opposition to their encroachments will sufficiently explain my meaning.

(7) A severe censure was passed in the House of Commons of Ireland, 1641, on the surrender of the Charter of the College of Dublin; see 1 Commons Journal, Irish.
We

We must not omit among modern questions, respecting incidents to Corporations, powers given by founders to the heads of Societies in some instances, of putting a negative on the wishes of the whole, or greater part of the body, which have been so warmly controverted and denied, I think I may say exploded within these few years. The power of founders to insist upon unanimous consent to a Corporate act, or to prevent a majority from binding the rest, unless that majority consisted of a certain number, had been in England defeated by stat .33 H. VIII. ch. 27. But in Judge Blackstone's opinion, a negative power in the heads of colleges remained; his opinion however has been much controverted of late, and among those who think him to have been mistaken we may reckon the learned Professor at Cambridge, Dr. Christian.

We have no such statute in Ireland as 33 H. VIII. ch. 27. but for the most part, especially in Colleges, there is no occasion to resort to any act of Parliament to oppose such a claim, but only to the plain words of the Corporation statutes (8).

By

(8) If it was undoubtedly given, it might be a question whether, we having no such statute in Ireland as 33 H. VIII. the power could be disputed; but in most cases where it has been claimed, and particularly in the College

By the Civil Law, consonantly with reason, if criminality was annexed to the acts of the members of a Corporation, every one of them was involved in it, who was not able to shew that he had at the time expressly dissented (9).

One

of Dublin, there was no occasion to recur to any act of parliament to defeat the claim, but merely to oppose it by shewing from the local statutes that no such power had been granted, and that the claim has been founded in error; this has been done in the University of Dublin, in a recent most ingenious legal pamphlet, usually ascribed to a very learned member of the same, and the opinion of him and his brethren was confirmed by that of the visitors. Similar determinations have been made by the Court of King's Bench, Cowper, 337; and by the visitor of Clare Hall, Cambridge, upon similar expressions, which are the usual language of College statutes, *guardianus, magister aut prapostitus & major pars sociorum*, that they do not give to such head a negative on the proceedings of the fellows.

(9) From this position, which I consider as universally applicable, I have been always of opinion that there is inherent in the members of a Corporation, or of the governing part thereof, a power of entering their dissent from any Corporate act in the public registry or records of the body; tho' I know this sentiment is by no means general. I say dissent rather than protest, because the latter is usually supposed to contain the reasons upon which it rests, and I should by no means urge that

One species of Corporations deserves particular attention, and more ample discussion of their incidents, Colleges framed for the advancement of learning (10).

These

that every man has a right to insert on the face of the public registry reasons which may be futile, absurd, or insulting to the majority; but it seems to me conformable to every principle of reason, that he should have a power of expressing his dissent, in defence of his character, as well as protection of his person or property.

(10) It was not till after the revival of letters in Europe, that Colleges and Universities began to assume their present form. Indeed I think it may be said, not until the 13th century, for it is in that century that first occurs some obscure mention of Academical degrees; much of the honor however of founding and putting them into their modern shape, is attributed to Peter Lombard, at Paris, and Gratian, at Bologna, the former of whom lived in the 11th, and the latter in the 12th century, and probably they were during those two centuries making their progress from the form of common schools in cathedrals and monasteries, where for the most part grammar only was taught, to the complete constitution of Colleges which they attained in the 13th century, when they began to confer degrees. It may be asked, was not Oxford with some other Universities founded as early as the 9th century? It is true there were numerous students there, and professors who read lectures in grammar, rhetoric

These in their present state and form seem to have been entirely the fruits of modern invention. The Grecian youth who attended the schools of philosophy and rhetoric, listened to teachers not authorized by the state, nor formed into Corporate Bodies on a public foundation, endowed with certain powers and capacities by the founder, subject to his laws, and possessed of funds distinct from the honorary fees of the student.

The

toric, divinity, philosophy, arithmetic, geometry and astronomy; but still such seminaries of learning were usually called only schools or studies, and were not founded or endowed or furnished with powers of bestowing public distinctions on learning like degrees, nor did the students live under the same roof. The University of Paris was the first which assumed the form of our modern Colleges, and from thence other Universities originally borrowed most of their constitutions.

The Civil Law claims particular merit in the advancement and encouragement of these seminaries, for it was at first chiefly owing to that inordinate and universal passion, which seized mankind, (after the discovery of the Pandects at Amalfi) for the study of this law, that such numbers flocked to the Universities where it was taught. The objects of study in these revered communities were divided into four branches: divinity, law and physic composed three of these, and the arts and sciences cemented under one head, formed a fourth. The power

or

Lect

The
pher f
feat of
the Ly
not ob
any pr
us, nor

or facul
to the f
hence in
to be ca
ference
teaching
versal kn
dent of
perly an
but one

One
Univers
origin a
opinion
neral Y
Dr. Ben
by the U
degrees,
nally in
forships,
dence.

The state sometimes encouraged the philosopher so far as to give him an assigned and fixed seat of instruction, as the Academy to Plato, and the Lyceum to Aristotle; but their disciples did not obtain, in consequence of their attendance, any privileges similar to those of graduation with us, nor was that course of study made a necessary preparative

or faculty of teaching these was bestowed by the state to the seminary, by the seminary to the individual, and hence in process of time, these branches of learning came to be called *faculties*, and the criterion or essential difference of an University was the power and licence of teaching the four faculties, the supposed compass of *Universal* knowledge; hence in my opinion, even independent of the special words of its charter, Dublin is properly an University; so is Glasgow, tho' consisting of but one college.

One of the most distinguishing features of modern Universities, is the power of conferring degrees, of the origin and nature of which no better account in my opinion can be found, than that given by Attorney General York, afterwards Lord Hardwicke, in the case of Dr. Bentley, who had been degraded from all his degrees by the University of Cambridge; the power of granting degrees, says he, flows from the Crown, they were originally in nature of licences to professors in several professorships, and are now titles of distinction and precedence. If the Crown erects an University, the power of granting

preparative to any profession ; whether this system was the best, I have not here room to enquire. It has been discussed by Dr. Smith in his *Wealth of Nations*, who seems to lean much against modern Universities. But perhaps I may embrace some other occasion of meeting the many and various recent attacks upon these celebrated seminaries.

At

granting degrees is incident to the grant ; they are not properly freeholds, or civil temporal rights, and tho' temporal rights be *annexed* to them, yet the University is not thereby deprived of their power of degradation, as a Bishop tho' he has a freehold and a seat in Parliament, may be deprived by his metropolitan. That question however was not decided by the court, the proceedings against Dr. Bentley having been irregular for want of his being duly summoned, and J. Fortescue indeed doubted whether, as degrees proceed from the Crown, the University could degrade.

Regents were originally teachers of the younger part of the University, and they were discharged of this onus after they had performed it a sufficient time, and became non-regents ; see this distinction discussed in the celebrated cause of the *King v. the Vice Chancellor of Cambridge*, on the great contest for the office of high steward of that University in 1765, between Lord Sandwich and Lord Hardwicke, 3 Burr. 1647.

The title of Bachelor, *Baccalaureus* from *Bacca lauri*, was introduced by Pope Gregory the 9th. in the 13th century, the idea perhaps taken from the military order, a Knight Bachelor,

At Rome, in the times of the Emperors, the professors in different sciences began to receive regular stipends out of the public treasury, to be authorised by the state, and to become subject to regulations and a form of discipline by it ordained. Constantine, Theodosius and Justinian seem to have been the chief promoters of these plans. The institutions for the purpose of teaching

Bachelor, sometimes meaning a young Cavalier who had served one campaign, and might be said to have arrived at the first step or degree in arms.

I shall now proceed to speak of collegiate duties, discipline, property and privileges.

As to their duties, I speak not of the general duty, of promoting sound religion and learning, nor of the particular injunctions of their several special statutes; but of such rules as are prescribed to them by the Canons of the Church or the Laws of the Land. By the act of uniformity 17 and 18 ch. 2. no form of prayer but the Liturgy of the established church is to be used in any College Chapel, *under severe penalties*. It is also enacted, that all masters and fellows of Colleges and so forth, must subscribe the acknowledgment of conformity and allegiance, usually called the declaration, on pain of disability or deprivation, and that heads of colleges shall also subscribe the 39 Articles, and the book of Common Prayer. By the 1st of G. I. ch. 13, in England, all heads and members of colleges must take the oaths of allegiance, su-

teaching the laws in particular begin from the 3d century to offer an appearance somewhat resembling modern colleges. If we had here full leisure to examine the traces handed down to us of the legal schools of Rome, Constantinople and Berytus, now Beroot in Phenicia, to which three places Justinian latterly confined this study, we should find some strong marks of affinity. We know

premacny and abjuration, in one of the King's courts, six months after admission, on pain of deprivation. I find no such act in our statute book, but as the statute of 2 Anne, ch. 6. Irish, had enjoined all persons taking offices civil or military, to take these oaths, (tho' it is doubtful whether our fellowships come within these words) yet we have always thought it prudent to do so, as also to qualify by taking the sacrament.

The Canons require in colleges regular performance of divine service, and administration of the sacraments, and enjoin the wearing surplices and hoods.

As to discipline, the particular mode of it being ordained and regulated by the statutes of each college, our principal enquiry must only be, how in general it is to be enforced; and here besides the ordinary power vested in the immediate and resident governors of the college, there is incident to every college, and indeed to every Corporation, an extraordinary or visitatorial power; what makes this less observable in most civil Corporations, is, that the King is their visitor, and as he can only visit in his Court of King's

know that the students in those places went thro' a course which lasted five years, and were divided into five several classes, with distinguishing names to each; during the first, or freshman year, they were called *dupondii* *, a name intimating that they were yet of no value; in the second year they read the edict, and were called *edictals*; in the third *Papinianists*, their study being Papi-
nian's

King's Bench, and not in person, we confound his visitatorial power with the exercise of it, in and by that court. All Corporations have their visitors, for otherwise, without superintendence and inspection, they might be subject to endless abuses; those merely civil the King, unless they have been endowed by a subject, and derive all their property and subsistence from him, in which case the subject is esteemed the founder and visitor, tho' he obtains the charter of incorporation, of necessity, from the King. In eleemosynary the founder is visitor, because tho' the incorporation comes from the King, the endowment comes from the founder, and therefore he is rewarded with the power of visitation, it being just that he who has given his property for a charitable purpose should have a power of seeing that it be properly applied.

With regard to Ecclesiastical Corporations, the ordinary is the visitor; this was the rule of the Canon Law,

* The lower classes have always been subject to a joke; in a college in America, where the author was for a short time, the class of the second year, were called *Sophimores*, compounds of sense and folly.

nian's works; in the fourth *αὐτοί*, from *αὐαί*, as having a power to answer questions like our Batchelors; in the fifth *αὐτοί*.

In the 11th book of the Code, tit. 18, it appears that no persons under pain of infamy and banishment were permitted by law to teach as public professors (tho' they might as private preceptors in private houses) unless established by government,

and is adopted by ours. The King is the supreme ordinary, he therefore can visit the metropolitan, the metropolitan the bishop, and the bishop all Spiritual Corporations, within his diocese, such as deans and chapters, parsons, &c. who are sole Corporations.

From these rules we are to deduce who are the visitors of colleges or universities. Of Universities being Civil Corporations, the King is visitor in his court of K. B. tho' some say they have no visitor. Colleges are not ecclesiastical Corporations, tho' it was held otherwise formerly, and tho' from such opinion, where visitors were not expressly appointed by the founders, bishops have frequently usurped the power of visitation, which is remarkably the case of the bishop of Ely, at Cambridge, who by long prescription, is now become the acknowledged visitor of many of the colleges there. Colleges then are lay Corporations, even tho' composed of ecclesiastical persons, and are said to be eleemosynary, tho' the general Corporate body of the university is not. The power of visitation of them therefore exists in the founder and his heirs, which power

government, and that the government had established in the Capitol a foundation of public professorships, viz. one of philosophy—two of law—three latin professorships of rhetoric, four of grammar—five greek professors of logic, and four of grammar, who could not teach privately under the same penalties of exile and infamy.

The

power they may grant and assign over to others, as is done by the King in our statutes to the visitors there named.

A special visitor being thus made, if he does not exceed his powers, *i. e.* if he determines on a matter which comes within his jurisdiction, tho' his determination be wrong, it is final and conclusive, and there is no appeal. This was decided in a very solemn manner, and after much debate, in the reign of King William, in the famous cause of Philips and Bury. The case was briefly this: Dr. Bury, rector of Exeter college, Oxford, deprived Colman, one of the fellows, for incontinency. Colman appealed to the bishop of Exeter, visitor; the visitor ordered him to be restored, the rector and senior fellows refused to obey the order. The visitor suspended five senior fellows, and deprived the rector for contumacy. He appealed to the King's Bench, and the principal question was, whether the King's Bench had any power to relieve him. Holt, Ch. J. a most eminent and public spirited Judge thought they had, the three other judges thought otherwise; and the opinion of that majority has been the rule of the court ever since, who favour the doctrine on this principle, that law suits among members of learned seminaries

The honors and privileges bestowed in consequence of proficiency in science, are every where to be found in the Justinian law. The professors and students were exempt from civil offices, and from the reception of strangers; no noisy trade could be carried on near these seminaries, which were usually called auditories; they were free from

seminaries should be discouraged as much as possible, and that it is better that one person should suffer, than that the discipline, government and peace of the college should be destroyed.

The same doctrine was held in Dr. Bentley's case, who was suspended from all his degrees, for contempt of the Vice Chancellor, who had issued a process against him at the suit of another famous man, Dr. Conyers Middleton. Bentley applied for a mandamus in K. B. and obtained it, because the University in their return to the conditional order, had not set forth that there was a special visitor, which therefore did not officially appear to the court, who otherwise would not have interfered.

But the King's courts may interfere as to the public laws of the land, (for the founder can only give the visitor exclusive jurisdiction as to his private statutes and the laws of the college) for instance, if fellows of a college should refuse to take any oaths prescribed by law, previous to their admission.

The visitor however must observe his power, and if he exceeds it is liable to an action; if the question be whether an offence is committed, he is the proper judge

from all ordinary taxes, and after twenty years, (some say thirty) honorable exercise of their profession, were entitled to the rank of Count or Comes, an honor the nature and degree of which is not very clear, Counts or *Comites Imperatoris*, being very various in station power, and honor. To obtain these privileges, among other requisites

judge, and perhaps of the kind and degree of evidence necessary to convict; but if he punishes for that which is clearly no offence, does not come within the statute, or is clearly not cognizable under his visitational power, an appeal lies to the King's courts. This may be illustrated by a case which was decided so lately as Easter term, 1788, in K. B. England. The fellows of Peter House, Cambridge, according to the power given them by their statute, had nominated and elected two persons for the office of master of the college, and returned them to their visitor, the bishop of Ely, that he might chuse one of them, which power of election was all the statute gave him; he rejected both on pretence that lapse had incurred, and from his general visitatorial power, appointed a third. Mandamus went to make him chuse one of the two elected. I may here observe, that if several academical persons offend jointly, they may as in other cases be punished severally, *e. g.* if the college seal be improperly applied or used, it is no defence to any individual when severally attacked, to say, that he set the seal in conjunction with his brethren; hence again, a power of protesting is necessary.

If

sites, to be matriculated was indispensibly necessary, and questions have been made, whether a man who was matriculated, and leaves the University with no intention of returning again, afterwards changing his mind, shall have any benefit of his former matriculation.

Constantine

If there be a dispute or question who is visitor, it must be tried by the King's courts.

I will beg leave here to add two cases which occurred, the first in 1775, the next in 1776; *King v. Grunden*, and *King v. Windham*. In the first, Charles Crawford, a fellow commoner of Queen's college Cambridge, had been expelled; appearing afterwards in the garden he was turned out, and indicted the person so turning him out for an assault: It was determined that independent members are mere boarders, have no corporate rights, and cannot appeal to the visitor.

In the *King v. Windham*, who was warden of Wadham college; a bill had been filed in Chancery against the warden, fellows and scholars. The warden disapproved of the answer of the fellows, put in a separate answer of his own, and refused to put the college seal to their answer, thinking there was some contradiction in this to his own private answer; the parties applied to the visitor, he refused to interfere. The majority of the fellows then applied to the King's Bench for a mandamus; it was granted, and the court said, that the visitor was right; that visitors are only to decide private disputes between members of the college, and not a suit by a third person

Constantine is said to have been the first who gave salaries out of the public treasury, tho' Quintilian, long before, speaks as if he had met with some public emolument, in consequence of twenty years meritorious service.

There

person against the whole body. So where an estate is in the college, and they are to act in a trust, the visitor cannot meddle in a matter which is the subject of such trust. Vide 1 Vesey. 463.

As to college property, having already mentioned their inability to take or purchase without a licence, I shall only observe, that the governors of it being only trustees for the purposes of the institution, can never alienate its property except from absolute necessity, such as existed here at the time of the revolution, *and the same was the rule of the Civil Law*; grant it they may in lease, for that is necessary, and evidently for the benefit of the college; but their leases are not valid if made for more than 21 years; and until a late remarkable statute in 1796 changed the law in *Ireland*, it was necessary to reserve a moiety of the full value; in England they may also lease for three lives, 13th Eliz. ch. 10. reserving in rent a moiety of the yearly value; the private statutes of a college may restrain it to fewer years. The 18th Eliz. ch. 6. in England, requires that in all college leases, one third part of the rent shall be reserved and paid in corn, by which means part of the rent, at least, is prevented from decreasing with the value of money. By the Civil Law corporations could lease only for one life or ten years; by the Canon only for three.

D d

I shall

There was at Constantinople, besides a college for the study of the law, one for the liberal arts, and

I shall conclude with a few words, on the privileges of Colleges; and here I am sorry to say, that I am forced chiefly to look abroad to English universities. Their civil jurisdiction, that union of civil and academical power, which takes place at Oxford and Cambridge, could not possibly exist in this great metropolis. But they have many privileges which might be communicable to us; some of them highly useful; all honourable.

Such are the exclusive privilege of printing certain books, and the concurrent right of printing others, as acts of parliament. 32 Geo. II.

The compliment which the law has paid them, of ordering that copies of all books published shall be deposited in their libraries, which indeed extend also to the libraries of the four Scotch universities.

The privileges of persons who have taken the degree of master, with respect to holding two livings. The privileges respecting post letters, not being under the controul of the General Post Office, or at least only with certain provisos.

The giving the universities the presentation to livings belonging to popish recusant convicts. The dispensing with residence to clergymen, abiding for study in the universities, and the exception in their favour which we mentioned above, as to bequests to charitable uses.

The qualification of property requisite to enable persons to represent the universities in parliament, is dispensed with in England with respect to members of



and both there and at Alexandria were celebrated colleges of Physicians.

All these colleges were liable to visitation and inspection, the lay by some of the civil magistrates, the ecclesiastical by the bishop of the diocese, as may be collected from the 83d Novel. and the Dig. 47. 22. 1.

of the universities themselves, but this exception is unnecessary here, there being no such qualification act.

In exemption from taxes, we enjoy much the same privileges with the universities of England, and however flattering it might be to obtain their smaller exemptions and privileges, while we rival them in sound learning and useful science, we have little to envy or to lament.

*Miscellaneous Cases respecting Colleges, determined since
the year 1785.*

A Mandamus lies to a visitor to hear an appeal and give some judgment, *Rex v. Bishop of Lincoln*, 2 Term Rep. 338.

The visitor of Jesus College Cambridge need not hear parol evidence on an appeal, it is sufficient if he receives the grounds of the appeal, and answer it in writing. *R. v. Bishop of Ely*, 5 Term Rep. 475.

N. B. The

By grammar, so often mentioned, was anciently understood not merely the rudiments of languages, but Classical Learning in general.

N. B. The doctrine in the last case, seems to be general, but appears so extraordinary, that it is to be hoped from *some expressions* in the case, that it applies only to that particular College.

If no special visitor be appointed by a founder, in default of his heirs, the right falls to the King. *Rex v. C. Hall, Cambridge*, 4 Term Rep. p. 433.

English statutes allowing privileges to the Universities, mean only the English Universities. *Jones and Smart*, Term Rep. 449.

N. B. A visitor cannot compel a specific performance of an agreement between a college and a stranger; nor can a Visitor administer an oath. See *Cow.* 378, and *Douglafs* 342.

RIGHTS of THINGS.

The order pursued in this book is as near to that of Judge Blackstone as possible; but as the Civil Law knew not the distinction between real and personal estates, the reader must not expect to see the titles to things real and personal seperately handled, as they are by him, nor consequently the same title repeated; as for instance, by occupancy, by forfeiture or by will, as he is obliged to do, first under the head of Title to Things Real, afterwards of Things Personal.

L E C T U R E S

ON THE

C I V I L L A W.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

Lecture the First.

ORIGIN OF PROPERTY,

AND

DIVISION OF THINGS.

THE Civil Law does not enter into the minute and subtle disquisitions about the natural origin of property which have employed the pens of Grotius, Locke and Blackstone. As far however as it has touched upon them it agrees, (in the opinion of Mr. Gibbon) with the Oxonian Professor, in deriving it from occupancy. To me it seems rather to coincide with Grotius, who deduces it from an implied compact of nations; for in fact, it
speaks

speaks of occupation only as one of the titles to property arising from natural law, *i. e.* says Justinian, from the Law of Nations, shewing that he is not speaking of the Law of Nature universally and in the abstract, *as it operates in a state of nature*, but *only* as it becomes a part of the Law of Nations. The language of Justinian in the Institutes is this—that all rights to things arise from the Law of Nature that is the Law of Nations, or from Municipal Law(1). Under the first he reckons occupancy, accession and tradition; under the latter, prescription, donation, inheritance, &c.

Next to the consideration of property in *general*, and its origin in the Law of Nature, natural order teaches us, first to treat of the division of things, then of property in them, and lastly of the *particular* modes of acquiring title to them, a method which has been pursued by the clear mind of Mr. J. Blackstone, and which I shall endeavour to follow, especially as Justinian here by no means furnishes a clear model for imitation (2).

In

(1) Accordingly Mr Blackstone speaks of that rule of the *Law of Nations*, recognized by the *Laws of Rome*, *Quod nullius est, id ratione naturali occupanti conceditur*.

(2) Justinian in his institutes is in this respect extremely immethodical, for in the first chapter of his second book,
he

In their division of things, the Roman Jurists, are much more minute, accurate and metaphysically exact than ours; things were, according to them, either *in patrimonio*, capable of being possessed by single persons exclusive of others, or *extra patrimonium*, incapable of being so possessed.

Things *extra patrimonium* were common, *i. e.* free to all mankind; public, *i. e.* belonging to some nation or people; *universitatis*, *i. e.* belonging to some certain city, society or corporation; or fourthly, things nullius, *belonging to nobody*, which included all things consecrated and devoted to religious uses, which are distinguished into sacred, sanct and religious.

This was the division of things in relation to their propertyship—with respect to their nature,

he begins with the division of things—then proceeds to the titles to them acquirable by the Law of Nature and Nations, and in the subsequent chapters of the same book returns to divisions of things, and to quantity of interest in them, thereby postponing the enumeration of the other methods of acquiring property viz. those by municipal law, and awkwardly separating these titles to property from the former, *i. e.* from those arising from the Law of Nature and Nations, by the interposition of the chapter of corporeal and incorporeal things, and of services, usufruct and use.

E e

they

speaks of occupation only as one of the titles to property arising from natural law, *i. e.* says Justinian, from the Law of Nations, shewing that he is not speaking of the Law of Nature universally and in the abstract, *as it operates in a state of nature*, but *only* as it becomes a part of the Law of Nations. The language of Justinian in the Institutes is this—that all rights to things arise from the Law of Nature that is the Law of Nations, or from Municipal Law(1). Under the first he reckons occupancy, accession and tradition; under the latter, prescription, donation, inheritance, &c.

Next to the consideration of property in *general*, and its origin in the Law of Nature, natural order teaches us, first to treat of the division of things, then of property in them, and lastly of the *particular* modes of acquiring title to them, a method which has been pursued by the clear mind of Mr. J. Blackstone, and which I shall endeavour to follow, especially as Justinian here by no means furnishes a clear model for imitation (2).

In

(1) Accordingly Mr Blackstone speaks of that rule of the *Law of Nations*, recognized by the *Laws of Rome*, *Quod nullius est, id ratione naturali occupanti conceditur*.

(2) Justinian in his institutes is in this respect extremely immethodical, for in the first chapter of his second book,
he

In their division of things, the Roman Jurists, are much more minute, accurate and metaphysically exact than ours; things were, according to them, either *in patrimonio*, capable of being possessed by single persons exclusive of others, or *extra patrimonium*, incapable of being so possessed.

Things *extra patrimonium* were common, *i. e.* free to all mankind; public, *i. e.* belonging to some nation or people; *universitatis*, *i. e.* belonging to some certain city, society or corporation; or fourthly, things *nullius*, *belonging to nobody*, which included all things consecrated and devoted to religious uses, which are distinguished into sacred, sanct and religious.

This was the division of things in relation to their propertyship—with respect to their nature,

he begins with the division of things—then proceeds to the titles to them acquirable by the Law of Nature and Nations, and in the subsequent chapters of the same book returns to divisions of things, and to quantity of interest in them, thereby postponing the enumeration of the other methods of acquiring property viz. those by municipal law, and awkwardly separating these titles to property from the former, *i. e.* from those arising from the Law of Nature and Nations, by the interposition of the chapter of corporeal and incorporeal things, and of services, usufruct and use.

E e

they

they were divided into corporeal and incorporeal—and the corporeal again into moveable and immoveable. This is the order and manner of division chosen by Justinian in the Institutes, and we shall follow it (3).

Things common to all, are those which being given by Providence for general use, cannot be reduced to the nature of property; such are the air, running water, the sea and the shores of the sea. By shore the institutes mean up to high water mark, or (where little or no tides as in the Mediterranean,) as high as the highest winter wave washes (4), but if a man by prescription, from
time

(3) The order adopted by the famous Roman lawyer, Caius, and apparently approved in the Digests, is somewhat different; he first distinguishes things into those of divine and those of human right, things of divine right he separates into sacred, sanct and religious—those of human into things *in patrimonio* and *extra patrimonium*, and under the *res nullius* a sub-division of the latter, considers not only holy things, but those which tho' not consecrated wanted a master, such as the *hereditas jucens*. Justinian confines the *res nullius* to things of divine right.

(4) Notwithstanding this position of the sea being common, many nations in modern times have claimed dominion over parts of it, as the Venetians over the Adriatic,

time immemorial had the use of running water, (5) as for a mill, his case was an exception to the general rule, but he must not waste the water unnecessarily, and mills and other buildings might be erected on rivers by particular licence. Vid. Digs. 48. 8.

Things public. Among things public Justinian principally notices, harbours, banks, and rivers, and the right of fishing in them. By the Civil Law the rivers were public; of exclusive rights of fishing the Romans had no notion, any more than of Game Laws, (6) and the inhabitants

atic, the King of Denmark over the Sound, and the King of Great Britain over the 4 seas. The learned Selden even contends that the sea is as capable of becoming property as the land. Undoubtedly where nations have taken upon themselves the burthen of freeing the sea from pirates, or erecting light houses on dangerous coasts, they have a right to reimburse themselves by duties upon passing ships, nor is it to be understood that foreign nations have a right to use the shore of the country against the will of the inhabitants, except from inevitable distress.

(5) By Magna Charta the appropriating running water, which it seems unnatural to restrain, was prohibited, consequently the rivers fenced at that time were directed to be laid open.

(6) It is their peculiar praise, says Gibbon. With us

tants of the waters became the property of the first occupant ; nor was any obstruction or diversion of a river allowed. See Dig. Lib. 43.

A bank of a river might have been private property, but it was so far publick that all persons had a right to come upon it for certain purposes, for instance for a towing path (7).

Res Universitatis, or Things belonging to cities or bodies politic. Such things belong to the Corpo-

by the Feodal Polity, the Prince claimed a right of granting franchises of *free* fishery in rivers, which by an odd perversion of language means exclusive fishery ; but these rights of fishery in consequence of Magna Charta, must be as old as Henry II's time. Probably very few of our present fisheries could boast such antiquity, or are really legal, but being proved to have existed longer than the memory of the oldest men living, are presumed to have been from Hen. II's time, no proof appearing to the contrary. Many Gentlemen in Ireland support their titles to fisheries by grants from Charles II. but such grants convey nothing, being directly contrary to Magna Charta, and are only corroborating evidence of the rights being from time immemorial.

A subject may have by prescription a right to a several fishery in an arm of the sea, 4. T. R. 437.

(7) This rule of the Civil Law, adopted also by our Bracton, was much insisted on in the case of Ball v. Herbert, 3 Term. Reports, when however it was determined that by the Common Law of England, the publick are not entitled to tow on the banks of navigable rivers.

ration

ration or body politic in respect of the *property* of them, but as to their *use* they appertain to all those persons that are of the Corporation or body politic; such may be theatres, market-houses and the like (8).

Res Nullius, or Things which are not the goods or property of any person or number of men, are principally those of divine right; they were of three (9) sorts—things sacred, things religious, things sanct. Things sacred were those which were duly and publicly consecrated to God by the priests, as churches and their ornaments, their chalices, books, &c.

Things religious were those places which became so by burying in them a dead body, even tho' no consecration of these spots by a priest had taken place.

Things sanct were those which by certain reverential awe arising from their nature—sometimes

(8) They differ from things *public*, the latter belonging to a *nation*.

(9) For tho' Caius in his division of things, makes them to consist of derelicts, treasure trove, the *hereditas jacens*, or an inheritance lying before it be entered on or appropriated, yet as these are of a private nature, and capable of proprietorship, Justinian more properly confines the *res nullius* to things of divine right.

augmented

augmented by the addition of religious ceremonies, were guarded and defended from the injuries of men, such were the gates and walls of a city, offences against which were capitally punished.

We have now done with things *extra patrimonium*, and must remind the reader that things *in patrimonio* are divided into corporeal and incorporeal, and the corporeal again into moveable and immoveable.

Corporeal things are those which are visible and tangible, as lands, houses, jewels, &c. incorporeal are not the object of sensation, but are the creatures of the mind, being rights issuing out of a thing corporeal, or concerning or exercisable within the same.

Corporeal things are either moveable, as silver, gold, household goods : or immoveable, as lands and houses (10).

Corporeal things may be unoccupied ; or held for life, or lesser term, or in inheritance ; in the second case the English Law calls them tenements, in the third hereditaments. So incorporeal rights may be tenements or hereditaments, as they are to exist for the life of the individual or to descend
to

(10) Moveables and immoveables are more usually and technically called by our Law, things real and personal ;
thus

to his posterity. The Civil Law does not make use of these terms, but yet like the English, in the division of things, pays more peculiar attention to those of an incorporeal nature, which we may if we please, to keep up the analogy, call hereditaments.

thus Mr. Blackstone defines in the second chapter of his second book, things real to be such as are fixed and immoveable ; things personal to be goods, money, and other moveables ; yet in his twenty-fourth chapter he is forced to depart from this definition, and to acknowledge that things personal include something more than moveables viz. what we call chattels real, (as leases for years,) which he says are of a mongrel, amphibious nature. Such awkward effects arise from our distinctions of real and personal property, and so much superior is the simplicity of the Civil Law.

LECTURE II.

Of Things or Hereditaments Incorporeal.

THESE being very numerous and various, legal writers have usually selected some of the principal for discussion. This Judge Blackstone has done to the number of ten.

The Civilians, tho' they enumerate many, such as the rights of inheritance and those arising from contracts, refer most of them to other proper heads, and confine themselves under this title to what they call *servitutes* or services. On this head therefore of incorporeal hereditaments, the English lawyer is not to expect discussions similar to those of Blackstone, on rents, commons, &c. but rather upon subjects which in the English law would be ranked and considered under the titles of easements or nuisances, for so the services of the Roman Law would be classed by us.

It may be agreeable however to the reader, before we proceed to these services, to know what the Civilians have delivered to us, upon some of the sorts of incorporeal hereditaments, chosen by

Mr.

Mr. Blackstone for special consideration, which are advowsons, tithes, commons, ways, offices, dignities, franchises, corrodies or pensions, annuities and rents.

On *Advowsons* it will be immediately perceived by the constant of history, little or nothing can be expected. The *jus patronatus*, or right of the person who built and endowed a church to nominate the officiating minister appears to have been allowed in the Roman law, Nov. 26. tit. 12, ch. 2. and Nov. 118. ch. 23. but was too young and infrequent to afford room for much dispute, or consequently to demand much legal regulation.

Tithes; the same almost may be said of tithes. In the earliest times of christianity the clergy were supported by gratuitous donation; the piety of the times rendered that support ample and liberal, and prevented or anticipated recourse to any claim of right; that fervour of piety had not subsided in the sixth century, the æra of Justinian's reformation of the law. It is not I believe any where alleged, that tithes were claimed as a right until the fourth or fifth centuries, tho' voluntary contributors had often made a tenth the measure of their devout remuneration of the services of the priesthood, and the claim does not seem to have been as yet so gene-

ral or so acknowledged, as to employ any chapter in the body of the Civil Law.

Common, or right of common. Of this right the Civil Law treats slightly and generally, among the various classes of services due by the land of one man to another : it recognizes particularly the *jus pascendi pecoris*, but does not enter into special distinctions of the different species of common known to the English Laws.

Ways, or rights of way. The divisions here were special and minute ; their rights were either *iter*, *actus*, or *via vel aditus* ; *iter* was a right for a man to go on horseback, or in a sedan over another man's land to his own, and where such right existed, and the road was out of repair, he who had the right of way might go over any part of the land he pleased (1). *Actus* was a right of walking, riding, driving cattle or a cart over another man's ground (2). *Via* or *aditus*, included the two former, and superadded the privilege of drawing stones or timber, or leading any body of men over the ground, provided it were done without damage to the corn or grass, within a

(1) The Law of England agrees says Blackstone, but he is mistaken except where the owner of the land is bound to repair. See Doug. 716.

(2) Called in England a pack or prime way.

space consisting of eight feet at least straight ways, and of sixteen feet upon turnings. All these rights of way might as with us arise from special agreement—permission or reservation—by prescription, or from necessity where one man's land is entirely surrounded by another's (3).

Rents,—All rents could be recovered by distress, and nothing being known to them analogous to the feudal tenures, consequently there were no such distinctions as rent service, rent seek, &c.

The rent might be either in money, or in a certain quantity of provisions, or in a portion of the fruits. The place and time for paying the rent, seem to have been regulated nearly as with us; the time *expressly*; it being a general principle of that law, that he who has a term for paying any thing, is not in delay till the last moment of that time is expired (4); but it does not say with our law, that though the rent be not due till midnight, it shall be payable before sun-

(3) A way with us may be pleaded as from necessity; and in pleading, the kind of way must be particularly shewn, whether it be a footway, horseway, or cartway. Vid. Yel. 164. 1 Durn. and East. 560. 6 Mod. 4.

(4) *Ne eo quidem ipso die, in quem stipulatio facta est, quia totus is dies arbitrio solventis tribui potest.* See Inst. de Verb. Obl.

set (5). The place *impliedly*, it being a general principle also, that where no place expressed, the thing should be delivered, or paid where it happened to be. Vide lib. 38. Dig. The thing to be paid therefore being the fruits, or something in lieu of them, I collect that payment was properly made where the fruits were, that is on the land.

The rent, (except in the long leases called *Emphyteuses*) was considered in the light of hire, or payment for the fruits of the ground, rather than as it is with us in the nature of an acknowledgment for the possession of the land. Hence if the lessee suffered by great and inevitable accidents, whether by the hand of God, or from the hand of man, he was discharged from paying rent, during the continuance of the calamity (6), and even

(5) With all due deference to all legal writers, this sounds very like a blunder.

(6) *Incendia, aquarum magnitudines, impetus prædonum a nullo præstantur.* b. 23. F. de reg. Jur. For the difference of our law in these respects, and its distinctions, see a learned note in Fonblanque's Eq, 1 vol. p. 366. our law does not discharge the lessee from the payment of rent expressly reserved, even though the premises be destroyed by fire or demolished by the King's enemies. It should seem by certain decisions that the lessee, would have relief in Equity. But of the propriety of these decisions, Mr. Fonblanque seems to doubt.

if

if he covenanted to pay his rent notwithstanding accidents, the covenant extended only to such as might be naturally expected from possible changes of weather, &c. and not to sudden and unexpected events, arising from the act of man, such as the inroads of an enemy.

• *Remedies for recovering the Rent*,—These were by distress, by ejectment or by action, as with us.

The first followed from the principle, that the furniture of a house, or the profits of a farm, were always impliedly mortgaged for the rent. Vid. Lib. 4 and Lib. 7, Dig. But beasts belonging to the plough, and other things necessary to tilling and cultivating the ground, could not be distrained (7), nor the bed or other absolutely necessary moveables of the lessee, an ordinance dictated by the same humanity which in the sixth and seventh books of the Pandects, forbids a debtor's wearing apparel, or bed being taken in execution.

The landlord could seize the effects on the premises to satisfy not only the arrears of rent, but the losses by dilapidations, and that whether these effects belong to his immediate tenants or to their under-tenants; but the goods of the under-tenant could only be seized to the amount of the rent he

(7) Agreeably to the ancient common law of England.

paid,

paid, and if he paid the head landlord, it was a defence in an action by the mesne. F. 13. 7. 11. 5. de pig. act.

The mode by ejectment, we find, in the Code and Pandects. Vid. 3 Lib. Cod. de Loc. and Domat. Book 1. Lib. 4. we find them speaking of *Colonum ejectum pensionum debitarum nomine*, and which is remarkable, the tenant could not only be ejected for non-payment of his rent, but also for damaging the house, or premises, carrying on in them an unlawful trade, or making a bad use of them in any other way.

Actions for the recovery of Rent,—The mention of these frequently occurs (8); they were favourable actions, and of the species which were called *bonæ fidei* (9).

Besides these spurs to the tenant to be punctual in the payment of his rent, he was also liable to interest upon it, from the time of its being legally demanded.

(8) Actions ex locato et conducto.

(9) The Roman Law distinguished between contracts *bonæ fidei* and contracts *stricti juris*. That is, some contracts were so to be interpreted by the rules of honesty and conscience, that they were supposed to include many things not expressly mentioned in the contract, while in others they adhered closely to the very letter of the contract.

Having

Having thus sketched the rules of the Civil Law on some of the incorporeal hereditaments which appeared most important to Mr. J. Blackstone, we shall proceed to the consideration of those which principally attracted the attention of the Roman Jurists, viz. Servitudes or Services.

Services, (which as I have said either correspond to what we denominate easements, or else would rank among rights to be secured from particular nuisances) were burthens affecting lands, or other subjects of ownership, whereby the proprietors were either restrained from the full use of what was their own, or obliged to suffer another to do something upon or respecting it. The former were called negative services, such as that a neighbouring proprietor should not build to darken my windows. The latter affirmative, such as a right to a watercourse over the lands of another (10).

Services again were defined, rights to which one thing was subject for use or convenience to another thing or person, contrary to common right. They were, therefore either Prædial or Personal. Prædial were burthens imposed upon

(10) In the former of the instances here adduced, we should deem it a security against nuisance, though we have no general term for such restraints. The latter we call an easement.

one

one tenement in favour of another tenement. Personal by which property was burthened, not in favour of a tenement, but of a person.

Prædial services were divided into rural services or of lands, and urban services, or of houses. The rural services of the Romans were *iter, actus, via aquæductus, aquæhaustus, & Jus pascendi pecoris*; foot-road, horse-road, cart-road, dams and water-courses, watering of cattle, and pasturage or common.

The chief affirmative services of the houses among the Romans, were those of support, viz. *tigni immitendi, & oneris ferendi*. The first, the right of fixing in our neighbour's wall, a joist or beam from our own house. The second, that of resting the weight of our house upon a neighbour's wall. There were, however, many others, such as of a way through another's house, or up his stairs, to apartments not his property; of even overhanging another's ground to protect a house from ruin; of carrying a sink through an adjoining mansion, &c. &c.

Negative services of houses were infinitely various. One or two examples may suffice; such as the restricting of a building formed so as to darken ancient lights, or to throw rain water from its roof upon another's ground; such as the restriction upon injuring the prospect from a neighbour's

neighbour's house, or against opening windows which may over-look another's habitation, and destroy his privacy (11).

Of personal services, or services due from a thing to a person, three were particularly noticed, usufruct, use, and habitation.

Usufruct was the right of using, taking and enjoying all manner of profits which arise from a corporeal thing belonging to another person, without any diminution of the substance or property thereof; it might be in cattle, bondmen, or any thing *not consumed in the use* (12). *Use* was a right

(11) The term services or servitudes is well known in the Scotch Law; in England and Ireland, such rights may be created by special covenant between individuals, and as to many of those above numerated, they exist of common right, E. G. an action would lie for darkening ancient lights, 9 Co. 58. b. and for overhanging another's house, or putting up a spout so that water fall upon another's premises, Stra. 634. but not for obstructing a prospect, or overlooking a neighbours retired walk, tho' I have known a warm contest upon the last point, which however did not come to a decision.

(12) An *improper* usufruct might even be of things that perish in the using, as of wine and oil. Our trusts as Mr. Blackstone has observed, do not correspond to the usufructs, but to the *fidei commissa* of the Romans.

a right of receiving so much of the natural profits of a thing as was necessary to daily sustenance.

Habitation was a right of a person to live in the house of another without prejudice to the property : this was assignable which a use was not, and as the house could be used only for a dwelling, it differed from an usufruct in it, because the usufructarian of a house might have applied it to any purpose, as to a store or a manufactory.

Usufructs in the Scotch Law are called life rents ; the interests of tenants for life or years among us may be compared to the usufructs of the Romans. These species of personal services tho' they may be created by special agreement, are little noticed among us, but with respect to those of a Prædial kind, whenever an English Lawyer wishes for information on the practice of Easements or nuisances under special circumstances, he cannot perhaps search for general principles as well as special detail more successfully than in the Civil Law, whose disquisitions on these subjects have been much more minute than ours, tho' the general principles so far agree as to make them I think almost equivalent to authorities among us. To go more minutely into the doctrine would be impracticable in an elementary treatise, on my present design.

profits
ance.

e in the
the pro-
was not,
welling,
the usu-
t to any

ents; the
may be
these spe-
eated by
but with
n English
of Ease-
he can-
ll as spe-
w, whole
more mi-
far agree
authorities
ne would
y present

Lecture the Third.

OF ESTATES IN THINGS.

THE highest quantity of interest which any man can have in property is the absolute, uncontrolled, independent, perpetual power over it⁽¹⁾. This might be had, by the Roman Law in that state where possession was perfectly allodial, tho' the highest estate of an English subject can be only in Fee Simple. The nature of an allodial estate, that is of one wholly independent, and held of no superior, is so simple and obvious

T E N U R E S.

(1) The English reader may perhaps be surprised to find the head of tenures totally omitted in the preceding part, 'till he is informed that they were utterly unknown to the Civil Law. They were equally strangers to the English before the feudal polity was introduced; from that period, it has been a fundamental maxim with us, that the King is the universal Lord and original proprietor of all the lands in these kingdoms, and that no man doth or can possess any part of them but what is de-

ous to every comprehension that it requires no illustration. Laborious comments, are only necessary to the Feodal Constitution or Doctrine of Tenure. On quantities of interest therefore the Roman Lawyers have said little or nothing.

Estates Tail,—Mr. Gibbon and others have positively asserted that the Civil Law was not acquainted with Entails. (2) I will not assert that it was, in the shape to which we have been accustomed, but it appears to me very certain that restrictions similar to those of entailing were familiar to the Romans, tho' not attended with all the concomitant ideas annexed by our Law to this species of Estate. In Dig. 30. 114. 14 A prohibition of alienation by will without cause exprefs is declared to be invalid. And then it

rived from, and *held* under and from him mediately or immediately in consideration of feodal services. But the Roman land owner did not *hold* of any superior, his possession was perfectly allodial and wholly independent. Tenures are the offspring of feudality, insomuch that Wright and Woodeson observe that the introduction of feuds and tenures is spoken of, as the same fact and event.

(2) Mr. Gibbon's words are—The simplicity of the Civil Law, was never clouded by the long and intricate entails which confine the happiness and freedom of unborn generations. 4th vol. ch. 44. p. 328. oct. ed.

proceeds

proceeds to say, *quod si liberis aut posteris, aut heredibus, aut aliis quibusdam personis consulentes, ejusmodi voluntatem significant, eam servandam esse*, and mentions an instance where a father having a son and three grandsons, *fidei commisit* to the son, *ne fundum alienaret, & ut in familia relinqueret*. Nothing can be plainer than this authority, to shew that restrictions upon alienating away from a family were valid. I agree with Mr. Gibbon, that this could not be done by *direct* Entail, because the Roman Heir or Devisee (as shall be explained more fully hereafter, under Titles by Descent and by Will) acquired an absolute dominion over the inheritance, without any possibility of fastening upon him *directly* any tack or appendage, in the way either of Entail or of Remainder; but I cannot agree with that celebrated writer, that this might not be done by way of trust. Under the name of *fidei commissary substitutions* says Wood (3), and rightly in my opinion, were comprehended not only Trusts, but Entails and Remainders. The method was this; tho' no such shackle could be put, as we have said, *directly* on the Heir, yet the Estate could be left to him upon trust, that he would at his death leave it to another, and so on, by way of what was called

substitution,

(3) In a note p. 140. 8vo. ed.

substitution, and the person thus substituted corresponded to the issue in Tail or Remainderman with us ; this being done however, merely under the principle that each possessor for the time being held only in trust to hand over, by some direction of his, when his time of enjoyment should be at an end, the estate to the next entitled, therefore these limitations of estate were not called by any term synonymous to Entails or Remainders, but comprehended under the general head of *fidei commissa* or trusts. (4)

Estates

(4) T R U S T S.

Trusts were first introduced at Rome in the time of Augustus, for the sake of those that could not have been devisees or donees, according to strictness of law, as for example Aliens. The estate therefore was conveyed to a Citizen, who was the direct heir the *fiduciarius* or trustee, on trust to deliver over the inheritance to the *fidei commissarius* or cestui qui trust, or to let him receive the profits, and as the execution of these directions depending on the honesty of the trustee was not sufficiently enforced at first, a prætor was appointed expressly for the purpose of forcing the trustees to fulfill the trusts.

Mr. Gibbon insists that the doctrine of trusts went no further at Rome, than the simple form above-mentioned, and that such *fidei commissary substitutions* as are relied upon in the text to prove the Romans had what may be called

Estates for life,—Estates for life are divided by Judge Blackstone, into those created by act of the parties, and those created by construction or operation of Law. Of the latter kind I do not find any among the Romans. T. in Tail after possibility is a creature of our own Law, and Tenant by the curtesy adds to his definition the words of *England*. With Tenancy in Dower, Blackstone has himself observed, the Civil Law

called trust entails, are of modern invention, feudal ideas grafted on the Roman jurisprudence, and derived from an abuse of the 159 novel, which he calls a partial perplexed declamatory Law. It is well known that Trebonian was accused of corruption with regard to the enacting of that Law, (which took the decision of a family dispute out of the ordinary Courts of Justice,) and that he is supposed therefore to have enveloped it in studied obscurity. But still enough in my opinion appears in that Law to shew that *fidei commissary substitutions* were then and long before usual. The case was briefly this; A. had left an estate by will with a prohibition of alienation out of the family; after 4 descents a part of it was alienated: the son of that descendant insisted on the will. The Law decides that in that particular case the testator's meaning was not to entail the prohibition of alienation beyond his own children, *i. e.* the 1st degree, but that at all events and in all cases it could not be extended beyond the 4th degree.

was

was unacquainted. In it therefore we shall only find mention of *conventional* estates or leases for life; and on these it has said very little, because tho' the Romans had such terms, they were not usual, their lands in general being set only for very short terms of years.

Estates for years,—The terms for years among the Romans were then as we have observed extremely short, like the modern tenures in France and Switzerland. (5) No term is more frequently mentioned than the quinquennium or term for five years, insomuch as to induce some persons to imagine that the power of leasing was

(5) In France, says Gibbon, all leases of land were determined in nine years, until this limitation was removed so lately as the year 1775, and adds that he is sorry to observe that it still prevailed in the beautiful and happy country where he then resided, in Switzerland. Gibbons Decline and Fall, &c. Chap. 44. in a note. Leases in China are not usually longer than seven years. Lord Macartney's Embassy, Vol. 2. p. 505. The reader will observe that tho' I have, (in Mr. Blackstone's method, and to conform as much as possible to the genius of the English Law), considered leasing and hiring of land separately and detached from other hiring, yet the Civil Law considers all hiring, whether of lands, houses, animals or other moveables, or even of personal labour, all together, under the class of contracts, and under the one head of locatio, hiring or letting to hire.

restricted

restricted to that period by Law, tho' Mr. Gibbon rightly supposes it was only by custom. (6) To estates for years therefore, their most usual mode of leasing, I shall confine a short account of such incidents to leases as I have been able to glean from the dispersed and extensive fields of the Civil Law. (7) Their Law of emblements was very similar to ours, and founded on a like

H h

principle

(6) From these observations on the shortness of their leases must be excepted their *Emphyteuses* or *Fee-farm* leases. They originated in the same cause which produced our leases so common in Ireland for lives renewable for ever, in the barrenness of certain lands, which on that account no person would take or improve on a short lease; indeed the *Emphyteusis* of the Civil Law is expressly held by celebrated writers to have been the parent of the English *Fee-farm*, and by some even of our copyhold estates, and I apprehend the Romans actually had leases for lives renewable for ever. The *Emphyteuta* was so called from being obliged to plant and improve the land; he could mortgage and alienate, but if he sold, the landlord had the first option as a purchaser, which was called *Jus Protomesios*. If he assign'd, he paid a relief which was called *Laudinium*. See Cod. 4. tit. b 8. Ch. 3.

(7) If this account appear superficial to the English Lawyer, it is because he is not acquainted with the difficulty of deriving from books *alone* at the distance of 1200 years, any thing like a complete system, where he

H h

is

principle of sound reason, that where a man knows the expiration of his time, it is folly for him to act as if he did not. This I think appears clearly from Dig. 19. 2. 9. where the case is put of a lease for 5 years, provided A so long lived expiring upon the death of A, and it is declared that if the lessee had done acts *quasi quinquennio fruiturus*, he must suffer for it, because *hoc evenire posse prospicere debuit*.

Mr. Gibbon has represented the interest of the lessee or colonus as miserable and precarious, and so it was in many respects, but not quite so insignificant or trifling as he represents it. He says no solid or costly improvements could be expected from a farmer, who at each moment might be ejected by the sale of the estate. Now true it is that if the lease did not men-

is to expect aid only from detached fragments, hints and allusions to practices and usages perfectly known at the time and therefore imperfectly explained; and where he perhaps does not find a subject treated of under one distinct appropriate head, but dispersed up and down under a thousand often apparently foreign to it.

On the particular subject of their leases for years, we must also observe that another difficulty in obtaining information arises from their being as little respected noticed or mentioned among them, as such tenures were among us before the reign of Edward I.

tion

Lect.

tion, a
lease,
on hi
of the
again
he wa
be wit
ed for

If v
to rep
the sto

[8]
of our
leases fo
recover

(9)
necessar
afford c
and Ro
Laws is
adviseabl
is true,
perimen
charges
deem, o
irksome
nefit fro
often do
from a b

tion assigns, the purchaser was not bound by the lease, (8) but then the lessee could come upon him for the loss he suffered by the breaking of the lease, and the vendee had his remedy over against the vendor. And as to improvements, he was not under the discouragements he would be with us, for he had a right to be reimbursed for all *reasonable* improvements.

If we add to this, that the landlord was bound to repair, and was in general obliged to advance the stock and improvements of husbandry, (9)

[8] It must be remembered that in the early periods of our history, a landlord could at will extinguish all leases for years upon his grounds, by suffering a common recovery.

(9) These provisions so apparently reasonable and so necessarily arising from the short tenures of the Romans afford other points of comparison between the English and Roman Laws. One great use of the study of other Laws is, to see whether any and what changes would be advisable to be introduced from them into our Laws. It is true, that it would be ridiculous to suffer every mad experimentalist, or expensive improver, to load a farm with charges which the landlord might never be able to redeem, or to break his contract at pleasure. But how irksome is it to a tenant to see another derive all the benefit from the value he has added to the estate, and how often do we see a lessee in vain praying to be discharged from a bargain become intolerable by unforeseen events.

and that the lessee could relinquish his bargain if he found it disadvantageous, the situation of the lessee for years, was by no means as bad as it was originally in these countries.

The xix book of the Pandects title 2nd, and the 4th Book of the Code tit. 65, contain the usual implied legal engagements between lessor and lessee; from its perusal we learn that the lessee was to use the land carefully and as a good owner should, and to pay the rent and surrender the premises uninjured, at the end of the term: he might let to others, but was answerable for the acts of his under-tenants as he was for those of his servants. He was not bound to repair except by special covenant or by custom [10]. He was obliged to

[10] In Ireland a covenant binding lessee to repair is almost universal in leases. In England a landlord repairs where there is no lease, and very often chuses to do so when there is, from regard to the neatness of his estate. Though there be no particular covenant to repair yet lessee for years is answerable for waste in general, and to let the house fall down would be waste. 2 Bl. Com. ch. 18. 1 Ves. 462. Lessee who covenants to pay rent and to repair (accidents by fire excepted), though the premises are burnt, and not rebuilt by the lessee after notice, continues liable to the payment of the rent. 1 T. R. 319. The civil law would

to qui
wanted
bound
holding
for the
proven
If evic
disturb
guished
good al
and all
was disc
event a
he was
the crop
nary na
common
weeds i
worn-ou
put in
not dif
the dan
passer,

would ha
without i
commit d
mental tre
2 Vern. 7.

to quit a house leased if the landlord really wanted it for his own habitation, and was bound to a temporary relinquishment of his holdings if the landlord wanted the possession for the purpose of repairs. If he made improvements or repairs he was to be reimbursed. If evicted by a stranger, or if the possession was disturbed by the landlord himself, rent was extinguished or suspended and lessor liable to make good all the damages which the farmer sustained, and all the profits he might have made. The T. was discharged from rent if by any extraordinary event arising from tempests or from an enemy, he was prevented from enjoying and reaping the crops. But if the accident was of an ordinary nature, or the damage received in the common course of things, as from pernicious weeds in corn, or from the too great age of worn-out vineyards, which are the instances put in Sec. 15 lib. 2. 19 Dig. the lessee was not discharged from paying his rent; So if the damage, tho' done by a voluntary trespasser, was slight. If landlord had remitted the

would have determined to the contrary. T. for life without impeachment of waste shall not be allowed to commit *destruction*, as by wantonly cutting down ornamental trees out of enmity perhaps to him in remainder, 2 Vern. 738. 1 Brown 166. 3 Bro. 549.

the year's rent to his suffering tenant, and that tenant, by the unusual fertility of the succeeding year, had amply compensated the loss of the former, the remission was done away and the tenant became again subject to the rent; it scarcely need be said that all these regulations might be altered and modified by special covenants, which might render the tenant liable to all losses, and exposed to all chances of events.

The Emphyteuses which were leases for ever, or for long terms of years, differing entirely in their nature from the short five years leases to which our observations have been hitherto applied, the principles applied to them were totally different; the Emphyteuta was bound to improve, he therefore got no abatements, as the conductor (which was the name for the ordinary lessee for short terms) did for extraordinary calamities. But in return he had the extraordinary privilege of relinquishing his bargain if he found it disadvantageous.

He too might mortgage and alienate, which the conductor or usufructuary could not: in fact the conductor was not considered as having any property in the land, but merely as having a title to the enjoyment of the fruits and profits, whereas the perpetual tenant was considered

Lect. II.

sidered
the *dire*
and hen
nant is
as or as
ing to
property

T. at
law ref
possible
from y
the tena
the land
to remo
quiesce,
renewal
be turne
tenant
years cer
ty in the
more va

[11].

the terms
have don
trine of
terms.

sidered as having the *utile* dominium, while the *direct* property remained in the landlord: and hence in the Roman law, the perpetual tenant is considered in a double capacity, either as or as not being the master of the estate, according to the different lights in which he and the property are viewed [11].

T. at will and by sufferance. The Roman law resembled ours, in striving as much as possible to construe tenancy at will to be holding from year to year. In the same manner if the tenant held over after the term expired, and the landlord did not immediately take legal steps to remove him, or seemed in any manner to acquiesce, his silence was construed to be a tacit renewal of the lease—and the lessee could not be turned out without regular notice; he became tenant from year to year, or sometimes for two years certain, for instance, if there was an inequality in the produce, which made every second year more valuable, his lease was tacitly renewed for
two

[11]. I have insensibly fallen here into the use of the terms landlord and tenant as Domat and others have done, though the Romans not having the doctrine of tenures, lessor and lessee are the more proper terms.

two years [12], and under some special circumstances he might thus tacitly become entitled to a term as long as his former one. Though on the contrary this tacit renewal might be for less time than a year, from the nature of the subject, *e. g.* of a wine press to the time of vintage. Such an implied renewal revived all the conditions in the former lease—it was a continuance of the first lease with all its consequences.

[12]. Our law nearly agrees in all these particulars. See 3 Burr. 109. Espinasse 469. Upon the whole, however, it must be acknowledged, that the Rom. lessees seem much to have resembled the Metayers in France, to whom the landlords furnished the seed and implements of husbandry, and shared in the profits; which says Mr. Young, in his tour thro France, promises well but succeeds ill. Lord Kaimes * observes, that it is believed to be the universal opinion, that without a long lease, it is vain to hope for an improving tenant; and tho' confidence may supply the want of long terms, yet says Adam Smith in his Wealth of Nations † perhaps England is the only country under Heaven, where a tenant will improve, and even build, without any lease whatsoever.

* Gentleman Farmer, p. 407.

† 2 Vol. book 3. p. 174.

Lecture the Fourth.

OF ESTATES UPON CONDITION.

OF these the principal and most remarkable being mortgages, I shall chiefly confine myself to them; previously remarking only, that in every law the scholar must naturally expect to find mention of conditions express and implied, precedent and subsequent, and of estates dependent upon them accordingly. They arise necessarily from the nature of things, and the commerce of men; but the Civil Law not having adopted certain subtle distinctions, which in ours make the *particular* consideration of such estates incumbent upon us (such for instance as between a condition in deed and a limitation) does not dwell with any peculiar attention upon such conditional estates, save upon mortgages, tho' it is by no means silent as to conditions in the abstract. (1)

(1) It views them under the head of covenants, which will come under our consideration in the third book.

Mortgages were so well known to the Civil Law, that many alledge, as Mr. Fonblanque has observed, that our own doctrines upon the subject are borrowed from that comprehensive code. Without determining that question, we shall find many things relative to them in its regulations worthy of Observation.

The pignus & hypotheca of the Civil Law are said, Dig. 20. 1. 5. 1, to differ only in name, yet in other places, and as Wood says in propriety of speech, the pignus is of things moveable, the hypotheca of things immoveable, like the usual distinction of a pawn and a mortgage with us. Yet Blackstone Com. vol. 2. p. 159. (2) and Mr. Powel in his Treatise on Mortgages, make the distinction be, that when actual possession passed to the creditor it was a pignus; when the possession remained with the debtor, it was

(2) Mr. Powel gives his opinion, that mortgaging (tho' by some thought to have originated with the Jews) *as practised with us, seems to owe its introduction more immediately to the Civil Law*, which distinguished between pledges and things hypothecated. Mr. Butler seems to differ, and says, they were rather introduced on our Common Law doctrine of conditions, an observation which Mr. Fonblanque truly says, at least cannot apply to the equity of redemption.

Lect.

was h
betwe
in wh
2, and
into c
the fir
therefo
mean
liens u
pledge

It w
be in v
for fra
thing,
if the c
debt, t
crime c
give h
Dig. 15
By th

(3) T
tant pign
says, pign
dicimus
mobilis f

(4) Et
probari p
4. See C

was hypotheca, analogous to our discrimination between the mortgage in and out of possession, in which they are supported by D. 50. 16. 238. 2, and Inf. 4. 6. 7. (3). Mortgages were divided into conventional, prætorian and judicial, (4) but the first only correspond to our mortgages, and therefore are alone here considered; the two latter mean what we call executions, or would term liens upon an estate; they were called also tacit pledges.

It was not necessary that the mortgage should be in writing, and as this naturally left an open for frauds, by secretly remortgaging the same thing, three witnesses latterly were required, and if the debtor had not sufficient to pay the second debt, the creditor might prosecute him for the crime of *stellionate* or fraud, because he did not give him notice of the precedent mortgage. Dig. 13. 7. 36. 1.

By the Civil Law, says Mr. Fonblanque, the

(3) The former authority however adds, *quidam putant pignus proprie rei mobilis constitui*; and the latter says, *pignoris appellatione eam proprie rem contineri dicimus quæ simul etiam traditur creditori, maxime si mobilis sit*.

(4) *Et sine scriptura si convenit ut hypotheca sit, & probari poterit res obligata erit*. Dig. lib. 20. tit. 1. sec.

4. See C. 8. 18. 11.

mortgage was properly a security only for the debt itself, for which it was given, and the consequences of it, as the principal sum and interest with the costs and damages laid out in preserving it, and did not involve such effects as that the heir of a mortgagor also indebted by bond to the mortgagee, should not redeem without also paying the bond debt, and such like provisions known to our Courts of Equity (5).

The twentieth book of the Digests and the eighth of the Code, furnish our knowledge of the Civil Law upon the subject of mortgages: all things which might be bought or sold, (which things were said to be in commerce,) might be subject to a pledge or hypothecue, lands, houses, moveable goods, debts and actions (6), and other rights, D. 20. 19. but tools and implements of husbandry could not be hypothecated, Code 18.

(5) He quotes, Dig. lib. 13. lib. 7. sect. 8. I think he is mistaken, and am supported by Code 8. 27. 1. which says directly the contrary, *si in possessione fueris constitutus, nisi ea quoque pecunia tibi a debitore offeratur vel reddatur, quæ sine pignore debetur (quam mutuum simpliciter accepit) restituere non cogeris, &c. &c.* Nor does the Digest quoted by him say it shall be security for *nothing more*.

(6) Our law differs as to debts, actions, or choses in action; they cannot by our's be transferred.

17. 8. and the dotal farm of a wife could not be mortgaged, even with her consent.

The mortgagee might have, by agreement, the profits of the property pledged, for the interest of his money, which was called *pactum antichreseos*; but the mortgagor, tho' he might covenant, that on failure of payment the property should be sold, yet, was not by law allowed to covenant, that it should be absolutely forfeited to the creditor, who might otherwise, taking advantage of his necessities, get possession of a large property mortgaged for a small debt. See Dig. 20. 1. 11. 1. and Code 8. 35. 3.

The mortgagor might indeed covenant that his creditor, on failure of payment, should have the thing mortgaged at a fair valuation, repaying the difference, if the value exceeded the debt, and the mortgagee could not be legally bound by any agreement not to sell at all.

The law therefore considered three cases and provided accordingly: 1. Where a power of sale had been included in the original mortgage. 2. Where it had been expressly excluded. 3. Where there was nothing mentioned upon the subject. In the first case, no notice was necessary to the creditor before the sale; in the second, the thing might be sold, but three notices were

were to be given, at certain stated intervals: in the latter, notice was to be given, and two year, must have elapsed from the time of that notice, before the sale could be made (7); but in none of these cases does it appear to have been necessary to go into any court, or to apply to any magistrate to authorize the sale, which was done by the private authority of the creditor, and the implied consent of the debtor (8). All these cases,

(7) Mr. Fonblanque says, no rule appears to have prevailed in the Civil Law restrictive of the time of redemption; he must mean no such rule as is adopted by our Courts of Equity of length of time being pleadable in bar of redemption, but he does not mean that he could not be foreclosed in the manner in text.

(8) Mr. Powel says, that the pignoratitious action was against the person of the debtor to foreclose him, when the pledge was already in the possession of the creditor. Mr. Powel is certainly mistaken in thinking, that any such action was necessary to enable the creditor to sell, or that he had occasion to apply to a court, nor was the pignoratitious action of that nature at all; it was properly an action given to the debtor against the creditor to recover the pledge, the debt being satisfied; and tho' the creditor had a contrary action of the same nature, it was for very different purposes, as shall be shewn in the sequel. In some cases, however, the Creditor seems

cases,
but if
sold in
a Prætor
obliged
and Co
alienar
possessi
of the
did, in
or not,
confusa

Pled
general
of a p
necessar
D. 20.
acquisit

to have
power to
to be sen
and it sh
a volunt
ferred th
language

cases, suppose a time of payment appointed, but if no time mentioned, the thing might be sold immediately; here, however, reason and a Prætorian Court would have intervened, and obliged a reasonable delay. See Dig. 13. 7. 18. and Code 8. 28. 4. and 34. 3. and Instit. quibus alienare licet. If the mortgagee had been in possession, or in any way recovered his debt out of the rents or profits he could not sell; if he did, in such case the sale could be rescinded or not, according as the buyer was or was not conscious of the fraud.

Pledges or mortgages were also divided into general and particular. In a general mortgage of a person's whole property, things absolutely necessary for the support of life, did not pass, D. 20. 1. 6. 7. but it extended to all future acquisitions, even without any express agree-

to have been obliged to apply to a court of justice for power to sell, when the debtor could not be found, so as to be served with proper notices of sale. Code 8. 34. 3. and it should seem as if he might, if he pleased, make a voluntary application to a court in any case, if he preferred that method to the one by private notice, from the language of Code 8. 34. 3. de jure dominii impetrando.

ment,

ment. Code 8. 17. 9. If a particular thing was pawned, every thing that was the product or part of it, if it continued in the same state, and was of the same nature was contained in the obligation (9). If possession was not given, all the property of the debtor was impliedly pledged to prevent frauds on his part in selling the thing mortgaged, Dig. 20. 1. 13. The mortgagee in possession was obliged to answer not only for gross but even light negligence, but not for the lightest fault (10). But he was not bound to answer for inevitable accident, unless they were occasioned by his means; he was to account for the profits, and if he had been satisfied out of the profits, the mortgage was at an end, and the possession might be redemanded. The mortgagor was obliged to allow in account, all necessary expences laid out on the premises, but whether improvements should be allowed, depended upon circumstances. In general, those which really increased the value of the estate were; merely ornamental were not. The first money paid to the creditor was applied in discharge, first, of the interest, and afterwards of the principal; and in case of a sale, of moveables

(9) See 1 Atk. 477.

(10) As to these distinctions see Jones on Bailments.

ables
movea
to pay
be tou
distinc
between
cial ple
ones.

The
failure
hypothe
possession
debt b
fits) r
a cour
the cre
in del
recover
gage v
creditor
repair
gaged
lien on
to the

ables and immoveables had been pledged, the moveables were to be sold first, and if sufficient to pay the debt, the immoveables were not to be touched; the only instance almost of any distinction in the Civil Law resembling ours, between real and personal estates. (11). Special pledges also were to be sold before general ones.

The mortgagee out of possession might, on failure of payment, obtain possession by the hypothecarious action: the mortgagor, when possession had been delivered, might (on the debt being paid or satisfied out of the profits) reclaim it by the pignoratitious action; a counter pignoratitious action was given to the creditor, where the pledge having remained in debtor's hands the creditor could not recover it, but sued for the value; the mortgage was affected by the privileges of certain creditors, as if money was lent to build or repair a house, which was afterwards mortgaged to another, the lender had a tacit lien or pledge on the house, and was preferred to the express mortgagee; so the landlord's

(11) See D. 50. 17. 23. 13. 7. 8. and 35. Dig. 42. 1. 15. 2.

claim of rent was preferred, but the claims of the Exchequer had no such privilege of being preferred to a mortgage, tho' they were to a simple debt, and the mortgage debt also took place of many claims which had privilege of other debts, such as funeral expences, &c. (12) these not being considered like those above-mentioned to be tacit, but direct liens upon the mortgaged property.

The 4th title of the 20th book of the Pandects, and the 18th of the eighth of the Code, treat of the order and priority of mortgages; the cases put are many and various, and do not seem materially to differ from the provisions of our own law. A subsequent mortgagee could of course receive nothing, till a former had been paid his principal, interest and costs, but he might buy off the former, and so protect or confirm his own title (13). We have before observed, that a mortgagee might tack another incumbrance to his mortgage, and if he lent more money by way of further charge on the estate mortgaged, he was preferred as to this charge also, before a mortgagee created in

(12) See Dig. 20. 2. 1. & 11. 7. 45.

(13) See 2 Vent. 337. 2 Vern. 156. 1. Bro. 63.

the intermediate time (14). Dig. 20. 4. 3. In some cases the subsequent mortgagee was preferred, E. G. if his mortgage had been made for the preservation of the pledge itself, as for the repairs of a ship, if that had been the security; (15) in the 16th section of the 4th title, 20th book of the Digests, a case is reported of a third mortgagee, who having defeated the first in a suit, and proved the weakness of his claim, claimed therefore himself priority to the second, who had been no party to the suit; it does not seem very reconcileable with the wisdom of the Civil Law, to have stated it as a serious question, but it serves to shew, that this species of property seems to have been as productive of controversy with them as among us.

To enter more into detail upon their law of mortgages would be foreign to my present plan. I shall conclude with observing, that the assignment of mortgages is frequently mentioned, under the name of subrogation or cession, and

(14) Compare this with the case of *Fraine v. Cole* in Chancery 1783, cited by Mr. Woodeson in his lecture on mortgages.

(15) Hypothecation of ships is by the Civil Law.

that a second mortgagee could not sue without satisfying the former (16).

(16) Mr. Fonblanque, in a note on book III. chap. 3. of the Treatise of Equity, observes, that the position laid down by Lord Hardwicke, and now undisputed, (viz. that a third incumbrancer without notice of a second, taking in the first, shall have satisfaction before the second) could not hold in any countries but these; because the jurisdiction of law and equity is administered in different courts, yet I think it held at Rome in the same court. I should hesitate long before I controverted the authority of Mr. Fonblanque, if this be controverting it, for perhaps he speaks of modern Europe only; his respectability is deservedly considerable, and every lawyer has experienced the utility of his commentary; but I am supported, I think, by Heineccius, in his Comment upon the 20th book, 4th part of the Pandects, *Qui potiores in pignore*, where he says, *hypothecarium posterio rem priori, sine volenti sine invito solvere vel offerre pecuniam, posse; eo facto jus omne pignoris, immo ipsum jus prelationis, in ipsum transferi, &c.*; the reader must be aware, that I could load the work, like Dr. Ayliffe, with an infinity of questions in the Civil Law between mortgagor and mortgagee, or the assignees of each, as well as between two mortgagees, where first brought by the latter to an account, if I thought they could afford either amusement or instruction to the modern lawyer. The Civil Law of mortgages is much referred to in Ryall v. Rowles. 2 Vesey, p. 169.

Lecture

Lecture the Fifth.

OF ESTATES IN JOINT TENANCY, COPAR-
CENARY AND COMMON.

OF REMAINDERS AND REVERSIONS.

UPON the subjects of this chapter I shall have occasion to say very little, for a reason very well and briefly expressed by Mr. Woodeson, when he is speaking of the refined speculations of the Civilians upon the nature of contracts, which is, that the thoughts of the Roman jurists were not immersed and entangled like those of the early lawyers of this country, in metaphysical and abstruse subtilties, applied to landed estates. We shall find therefore among them, none of the metaphysical distinctions between the seisin of joint-tenants and tenants in common, nor any elaborate niceties about vested and contingent remainders. Joint estates of necessity they had : as all property gavelled,

gavelled, the takers by descent, of course were coparceners. Of tenancy in common little mention is made (probably because they considered it too plain a subject to require illustration) enough however to shew us, that it was favoured with them, even more than with us, for strictly speaking, jointtenancy could not, by the Civil Law, be created by deed or inter vivos at all, but only by will.

The points to which they have chiefly attended, are the *jus accrescendi* and the right of partition; the *jus accrescendi*, is the very same term which is applied to the right of survivorship by our ancient lawyers (1). This *jus accrescendi* had place between coheirs and between joint devisees or legatees, but not in services, nor among merchants, nor in donations or grants inter vivos, except they flowed from the Emperor, nor in substitutions in trust, but in direct substitutions it had (2).

(1) See 2 Black. Com. p. 193. and Mr. Christian's note thereon.

(2) See Code 10. 14. Dig. 32. 3. 89. Code 4. 37. 3. Tho' there was *jus accrescendi* between legatees, this only means where one died before testator, or would not accept his part, for if both outlived him there was no survivorship between legatees, and the same is our ecclesiastical law. See Swinburne, Part 1. Sect. 7. and 2 Lev. 209. our law agrees as to merchants.

The

The action *communi dividundo* lay by one joint tenant, or T. in common against another, to oblige him to divide the joint property, which was called *rei communio*. But if the holders of the joint estate were coparceners or coheirs, their remedial action in this case was called *familiæ erciscundæ*. See 3 Inst. tit. 28. If a thing could not conveniently be divided, the whole might be adjudged to one, he paying the other the value of his part; or if matters could not otherwise be settled, the whole must be exposed to sale, Code 3. 37. 1. & D. 8. 4. 5.

If the united property was in unequal shares, the greater share might be charged with a service to the other, D. 2. 10. 22. 3. and every share stood as a warranty to the title of the others. C. 3. 36. 14.

The title deeds of an estate in common, might be ordered by the Judge to be left with him that had the best part, and that the others should have authentic copies, or if all had equal interest, the Judge might nominate a person to keep them safely in his custody. Dig. 10. 2. 5.

REMAINDERS AND REVERSIONS.

In strictness, or by any direct mode undoubtedly, as we have repeatedly observed, there
could

could be no such thing either as entails or remainders (3). Nor did the usual substitutions signify any thing similar, they were vulgar or pupillary, the vulgar substitution signifying the appointment of a substitute in case the heir at law or original devisee would not accept the heirship; the other providing, that in case a minor son would not accept the heirship, or having done so, should die under age, the appointee of the father should come in his place, to which may be added the Quasi pupillary, differing from the last only in its object being an idiot or lunatick, whether minor or not. But I am supported by Mr. Wood and the French jurists, in thinking that fidei commissary substitutions, often corresponded to our remainders, and what I consider much more than either, I think I am supported by passages in the Code. The Pandects, lib. 28. tit. 6. sect. 23. speak of cross remainders, *Qui plures hæredes instituit ita scripsit, eosque omnes invicem substituo*; but what

(3) In thinking that they could even indirectly, I have to combat not only Mr. Gibbon, but Dr. Adam Smith, who on the Wealth of Nations, book 2. chap. 3. p. 166. treats with contempt these fictions, as he supposes them of the French lawyers; he says, neither fidei commissa nor substitutions resembled Entails. Dr. Halifax is at issue with him, for he says they did.

I think

what I chiefly rely upon is, the 6th book and 42 title of the Code; there among other things this case is put, Si frater tuus postquam patri hæres extitit, pubes jam factus decessit, ex pupillari substitutione tibi hæreditas ejus delata non est. Sed si verbis fidei commissi aliqua parte testamenti confirmata est, fidei commissum ab hæredibus petere non prohiberis.

Now since, as Mr. Gibbon says, the power of the testator expired with the existence of the testament, and the heir who accepted acquired an absolute dominion over the property, how in this case could the brother have succeeded but as a remainder man, by virtue of the trust created by the father's will.

I think I have conceded too much to my respect for Mr. Smith and Mr. Gibbon by granting in the text that pupillary substitutions did not resemble remainders; in some instances surely they did; what is a devise to a son and if he die under age to a stranger, but a contingent remainder as to the latter? and did not the famous case of Curius and Coponius, argued by no less men than Scævola and Crassus (which Lord Mansfield has peculiarly noticed) respect a remainder: That was a devise to a child with which the wife was supposed to be pregnant, and if such child died under age, then a devise over. Cic. de Oratore, lib. i. Burr. 1623.

Reversions, literally speaking, the Romans must have had, but not in our feudal sense of them, nor with their feudal consequences, such as the incidental rights of the reversioner respecting rents, and the peculiar modes of the descent of reversions, which introduce them with us to the particular notice of legal writers.

We have now described the nature and divisions of things, and the several kinds of estate or interest that might be had in them. We shall proceed in the ensuing chapter to consider the titles to things; not first to things real, then personal, as Sir William Blackstone has been forced to do by the genius of our law, but according to the mode of the civil, to both together—to things in general.

Lecture the Sixth.

LAW OF DESCENTS.

THE Roman law of descents is worthy of our attention, as our rules respecting the devolution of personal property have been in a great measure borrowed from it, and as it has been frequently resorted to in our municipal courts, in controversies respecting distribution and administration (1).

But before this law can be perfectly understood, it will be necessary to explain (what has been

(1) That the statute of distributions has been copied from the Civil Law some have denied, but Lord Hardwicke, in the case of Wallis and Hodson, 2 Atk. 115. expressly says, what the Master of the Rolls (Prec. in Chancery 594.) had said before, that the statute of distributions is to be construed by the rules of the Civil Law. Upon this subject then no one will deny, that a knowledge of the Civil Law is useful and necessary.

That this celebrated statute was prepared by a very

Ll 2

eminent

been frequently before alluded to) the nature of the Roman heir or heirship. The meaning of an heir in the Civil Law, was very different from the signification of the word in ours; they applied the name both to him who took by descent, and to him who took by will, and to the heirship by descent, annexed ideas utterly unknown to our law. Their singular conception of an heir was this, that he was one and the same *person* with the deceased; that he represented him *personally*; and his representing him with respect to subjects of property, did

eminent Civilian Sir Walter Walker, every one knows; but Sir William Blackstone has chilled a little our spirit of enquiry, by coldly saying, that it bears some resemblance to the Roman law of successions, *ab intestato*, however, as he subsequently acknowledges, that the doctrine and limits of representation laid down in the statute of distributions, seem to be chiefly borrowed from the Civil Law, we have no occasion to be discouraged in the pursuit, and may perhaps impute this seeming reluctance to admit the received opinion, to an anxiety to do honour to the ancient English law. See Black. Com. vol. 2. ch. 32. The reluctance of that learned judge to admit our debts to the Civil Law frequently appears, they are no where more manifest than in the *donatio mortis causa*. Yet even as to that he only says, that it *seems* to be borrowed from the civil lawyers, and he shews the same jealousy as to the *collatio bonorum*.

not

Lect.

not m
and c
confid
perty,
of cor
The p
ration
one a
of an
is the
this m
Kaime
his Pr

Dr.

Blackf
explai
says h
so tha
tance
nue in

(2) V
sey 91.
but this
without
property
the Ro
times f
—In lat

not more or less enter into the Roman notion and definition of an heir; the succession was considered not as a right of succeeding to *property*, but of succeeding to the person deceased, of coming in his place and representing him. The person owning the estate was like a corporation that never dies; he was supposed to be one and the same; and this extraordinary idea of an heir is ingrafted into the Scotch law, and is the parent of many consequences therein; this may be illustrated by consulting Lord Kaimes's Law Tracts, a work much superior to his Principles of Equity (2).

Dr. Christian, in a note on the 2d volume of Blackstone's Commentaries, very well and briefly explains the Roman heirship: the Civil Law, says he, considers father and son as one person, so that upon the death of either, the inheritance does not so properly descend as continue in the hands of the survivor,

(2) With a view to these principles, it is said, 2 Vesey 91. an executor was an heir by the old Roman law, but this I think leads to error, for an executor may be without any beneficial interest—a mere manager of the property, and trustee for others, an idea unknown to the Romans till introduced by the ecclesiastics, sometimes for charitable—sometimes for interested purposes—In late times of the Empire.

From

From this principle many curious corollaries followed. We have already mentioned, that the ancestor could not directly entail the estate or name a remainder man, tho' he might by the circuitous method of binding the heir in shape of a trust; this followed from what has been said, for the inheritance being entirely the heirs and perfectly in his disposal, any future heir now named by him, took place of any other heir formerly named by the ancestor, and the power of the ancestor over the property necessarily ceased with his life, and could not be exerted or extended beyond it.

From the same principles followed the celebrated rule of the Civil Law, *Nemo mori potest ex parte testatus, ex parte intestatus*, that a man could not die partly testate, partly intestate, because his representative from their legal identity, must have all his property; and that the *hæres factus* or devisee, was not considered so much as taking by purchase as by descent, not as devisee but as *heir* not indeed natural but appointed, yet still an heir,

Hence also arose a grand distinction between their law and ours as to payment of debts; the creditors of the deceased could come upon his heir, not only to the extent of the assets he had

Lect

had b
he had
foever
might
oblige
a son n
a year
But in
footing
invent
paratin
proper
ger (3)
the ow
be his
of dyin
of avoi
by the
tinct m
upon th
the dor
either n
sui et ne

(3) T
long pre
Tracts.
de Succ

had by descent, but also upon all the property he had in the world, howsoever or from whomsoever he might have acquired it. As this might often be a great hardship, no man was obliged to take by descent as with us, and even a son might refuse to be heir, or he might take a year to deliberate whether he would or not. But in later times, things were put more on a footing of good sense, the heir might make an inventory of the deceased's effects, and by separating them from his own, screen his other property from debts to which he was a stranger (3). If no person would take the heirship the owner of property might oblige his slave to be his heir, which was often done in expectation of dying deeply in debt, from a whimsical idea of avoiding disgrace, since the goods then seized by the creditors would be those not of the extinct master but of the slave, whose dishonour upon this occasion was always compensated by the donation of freedom; heirs therefore were either *necessarii* as the slave just mentioned, or *sui et necessarii*, as the sons of deceased (the latter

(3) This whole system, both in principle and practice, long prevailed in Scotland. See Lord Kaime's Law Tracts. For the Roman law of heirship, see *Institutes de Successionibus ab Intestato*.

epithet being added, because they could not be excused without application to the Prætor) or *extranei* strangers, who were at perfect liberty to act or not as they thought fit (4). Having thus explained the heirship of the Civil Law, and having observed that the Roman law of descent is so far interesting to us, as it gave rise to our law of succession to personal estates and order of granting administration, and furnished hints for our statute of distributions (5), it seems superfluous to go further in delineating the Civilian's canons and rules of descent, than their ultimate establishment and ordination by Justi-

(4) Monsters could not be heirs by the Civil Law, nor bastards to the father's inheritance, but they might to the mother's; indeed if the father had no lawful wife or child, the bastard with his mother succeeded to one-twelfth each. Nov. 89. ch. 8. & 12. Cod. 6. 59. 5. Fif. 1. 5. 14.

(5) Dr. Christian observes, that tho' it is said that the canon law computation has been adopted by the law of England, yet he does not know a single instance in which we have occasion to refer to it; but that the Civil Law computation is of great importance in ascertaining who are entitled to administration, and to the distributive shares of an intestate's personal property. Note on 2 Bl. C. ch. 14. p. 208.

nian

nian (because their situation at that period alone has been regarded by our laws) without reviewing those perplexed and intricate changes which they passed through antecedently to his reign. I shall however subsequently point out some of the principal of these to the readers attention.

The canons of descent or succession adopted by the Civil Law differ from those of our common law as to real estates in almost every particular, as will appear by the following comparison.

First, All property (whether what we call real or personal) gavelled and descended equally among all the children of the deceased both male and female, without regard to primogeniture or sex, with representation ad infinitum. Nov. 118. ch. 1. and Nov. 22. ch. 29. See also Wood.

Secondly, The right of inheritance could ascend as well as descend; the rule was defended by the obligations of the child to the parent, as well as by the supposition of the estate having often proceeded from his bounty; better reasoning at least than Lord Coke's in support of the contrary doctrine viz. that *gravia deorsum tendunt*.

Thirdly, Whereas real estates with us always go per stirpes, at Rome all property whatsoever descended sometimes per stirpes, sometimes per capita; in the direct descending line always per

M m

stirpes,

stirpes, and so among collaterals taking by way of representation, where any person (6) of equal degree with the person represented still subsisted, but if all took in their own rights they took per capita.

Fourthly, In their method of computing degrees they reckoned not as we do from the common stock downwards, to each of the persons related or to the most remote of them, but from the person *a quo* upward to the common stock, and then downward again to the other party related; a distinction between their law and ours familiar to every lawyer (7).

Fifthly, No such rule as that on failure of lineal descendants, the inheritance shall descend to the blood of the first purchaser, nor any consideration had, whether the estate first came by father or mother's side.

Sixthly, The half blood was not excluded,

(6) Nov. 110. c. 3. Inst. 3. 1. 6. A brother and two nephews of deceased took per stirpes, but if no brother alive, the children of brothers would take per capita. See Walfh and Walfh, Prec in Chan, 54. and 2 Bl. Com. 217. octavo, and Davers v. Dewes, 3 P. Wms.

(7) Thus by our law, first cousins are in the second degree, by the Civil Law in the fourth, viz. to the father one degree, to the grandfather two, to the uncle three, to his child a cousin four.

though

though postponed to the whole, as we shall see hereafter.

Seventhly, The agnati, or relations by the father's side (8) were not preferred to the cognati, or relations by the mother, though they had been so until the distinction was abolished

(8) I bow to Blackstone, Ellis and Wood, in interpreting agnati to mean relations by the father's side, yet I think that was not always the meaning; Heineccius interprets them to be *per virilis sexus personas conjuncti*; Gibbon calls them persons connected by a line of males. According to these distinctions I should suppose that the son of a father's aunt should be a cognate, not an agnate, and in 2d of the Institutes the son of a sister is specially transferred from the cognates to the agnates.

The cognates were preferred to the Gentiles; by the Gentiles were meant those of the same general family united by one common name, *a gens like a tribe or clan*; the nomen marked the gens; the cognomen or surname the particular branch of that family. Caius Julius Cæsar was of the Julian family, and of that branch of it called Cæsars, the Julii were gentiles to him, the Cæsars agnates. To Publius Cornelius Scipio, Publius was the prænomen corresponding to our christian name, Cornelius the name, Scipio the surname, i. e. he was of the Scipio branch of the Cornelian family: sometimes an agnomen was added, as to him Africanus. The wife took the husband's name as with us.

by Justinian himself, and rightly says Sir William Blackstone, because as the Roman law gave no preference to males in lineal succession, there was no reason for preferring them in collateral (9).

Having thus shewn how very different their canons of descent were from ours, I proceed to sketch the method in which they searched for the heir of an intestate, or the successor to his estate.

1. In the first place succeeded all his children, by equal portions, with representation ad infinitum, without any respect to primogeniture or preference with regard to sex.

2. If no descendants, the father and mother brothers and sisters of deceased, by the whole blood, shared his property in equal portions (10).

3d. If

(9) Sir William seems to forget that in collateral, the relations by the female line would even at Rome carry their portions of the estate into another name and family. The Institutes say, *Commodius videbatur ita jura constitui, ut plerumque hæreditates ad masculos confluerent*. Lib. 3. tit. 2.

(10) Not so by our law. With us the father excludes not only the mother, but the brothers and sisters; if no father alive the mother excluded brothers and sisters,
until

Left.

3d.
him,
came
grand

4.
the w
dead,
stirpes
repres
sisters
repres

until th
liam II
so the
case of
ferred
nearer
lineal;
aunt, b
because
nearer
law, fo
ascendin

rence.
(11)
estate.
against
by Lord

3d. If the parents of inteſtate died before him, his brothers and ſiſters, by the whole blood came in, in preference to his grandfather or grandmother (11).

4. If *ſome* of the brothers of the inteſtate by the whole blood ſurvived him, but *others* were dead, leaving children, thoſe children took per ſtirpes their father's reſpective portions jure representationis: but if *all* the brothers and ſiſters of inteſtate died before him, the right of representation was not extended to their children;

until the ſtatute of 1 James II. in England, and William III. in this country, admitted them with her. And ſo the whole aſcending line, as Lord Holt obſerves in the caſe of Blackborough and Davis, 1 P. Wms. 51. was preferred untill the ſtatute of diſtributions ordained that a nearer collateral ſhould be preferred to a more remote lineal; in that caſe the grandmother was preferred to the aunt, both as to adminiſtration and as to diſtribution, not becauſe in the aſcending line of kin, but becauſe ſhe was nearer of kin according to the computation of the civil law, for *after the ſtatute of diſtributions*, her being in the aſcending line ſimply, would not have given her a preference.

(11) The rule in our law is the ſame as to perſonal eſtate. This is the famous queſtion argued by Voet againſt Domat and others. Voet's opinion is confirmed by Lord Hardwicke, and eſtabliſhed as law with us in the

dren; in that case the parents or nearest ascendants living, however remote, came in, in preference to the nephews and nieces of intestate, or any other collaterals (12).

5. No

the case of Evelyn and Evelyn. 3. Atkins. 762. Same case is reported by Ambler.

(12) We have observed in the preceding note, that the brother was preferred to the grandfather, but it appears by the rule above, that a deceased brother's son was postponed to him, and indeed to any other ascendant, unless there was some other brother still surviving. This seems to be contradicted by Wood, who says brothers and sisters children are admitted with the ascendants in the right line—but I think it is expressly delivered in the 127th Novel. cap. 1. which first gave the right of representation, and after mentioning that brothers children had been by a former law totally excluded, goes on, *Si moriens relinquat adscendentium aliquem, & fratres qui possint cum parentibus vocari, & alterius præmortui fratris filios tum cum ascendentibus et fratribus vocantur etiam præmortui tui fratris filii.* Upon which Heineccius thus comments, *Si soli existent germanorum liberi, illi ab adscendentibus excluduntur;* and Sir William Blackstone says, 2 Comm. p. 214. he apprehends that by the civil law, if *all* the brothers and sisters were dead, their children took per capita, not per stirpes, in their own right, and not jure representationis.

Here again I apprehend the rule of our law, as to personal

5. No brother or sister by the whole blood surviving intestate, and the ascending line being spent, next came in nephews and nieces by the

personal estate, agrees with the civil, as in preferring the grandfather to the nephew of the intestate, if all the intestates brothers are dead, but not otherwise. It does not indeed (since the statute of distributions was made) agree with the civil law. in preferring all the ascendants in such a case to the nephew, because that statute prefers a nearer collateral to a more remote lineal; but that it does agree in preferring the grandfather, who is nearer of kin where the nephew does not take jure representationis, appears, I think, from the case of Walsh and Walsh, Prec. in Chan. 54. Keilway and Keilway, 2 P. Wms. 344. Davers v. Dewes, 3 P. Wms. 40. Lloyd v. Tench, 2 Vesey 213. and Stanley v. Stanley. 1 Atks. 455. In this last case the Chancellor says, the words of the statute of distributions do suppose that there must be some persons to take in their own right, and others by way of representation. On the same principle in the case of Durant and Bestwood, 1 Atk. 454. an aunt and nephew were decreed equally entitled because equally of kin, and no representation allowed, no brother being alive. It must be carefully noted however, that this rule does not extend to cases under the statute of William III. d. which enabled brothers and sisters to share with a mother. In the same case of Stanley and Stanley, nephews and nieces of intestate were decreed to share with his mother and widow, though no brother or sister of the intestate living.

whole

whole blood, in preference to brothers of the intestate by the half blood.

6. Brothers and sisters by the half blood and their children, the nephew by the half blood excluding the uncle by the whole (13).

7. Other collaterals according to proximity.

8. Husband to wife, or wife to husband (14).

9. The

(13) I have taken these two last rules of succession verbatim from Wood, not being able to satisfy myself from the original authorities, though it seems somewhat difficult to see the reason of them, or to reconcile them with the preceding, for if there was no representation where all the brothers were dead, why should the nephew be preferred to the uncle, any more than he is with us in such a case. Perhaps these rules suppose a brother of the half blood at least to be still living.

Our law here differs, not only in putting uncles and nephews, where the nephews take in their own right and not *jure representationis*, on a footing, but also in not postponing the half blood, or making any difference between it and the whole as to personal estate. Sir William Blackstone in his note on this subject to Book 2. ch. 32. of his Commentaries, seems not to attend to this preference of the whole blood, or to the narrow limits of the right of representation. Note! it has not been determined that the half blood should succeed equally with the whole under the statute of James II. said by L. C. Wallis and Hodson, 2 Atkyns.

(14) With them therefore the husband and wife did

not

9. The Exchequer by escheat (15).

Having thus stated the canons of descent as finally regulated by the novels; it may be requisite briefly to mark how the law stood antecedently in some remarkable instances, which occasion much diversity, even between the novels, and the institutes which were previously published.

By the old law lineal descendants thro' a female had been postponed to all collaterals, but latterly had their remedy with the Prætor.

There

not succeed to each other, but on failure of all the other relations of each party, and with us as to real estate, they cannot succeed each other at all. But amongst us the husband has an exclusive right to all the wife's personal property, as well as to administration to her, without being obliged to distribute among her next of kin, (See 2 Mod. 20. and the express words of the statute of distribution,) and the wife surviving shares with the children or other next of kin.

(15) So with us, the Crown is entitled if no kin can be found. In such cases therefore a suit is commenced in the Ecclesiastical Court in the name of the Attorney General, for the administration, &c. If indeed the want of kin arises not from natural events, but from legal ordinances, as E. G. from the deceased being a bastard, dying without a wife or children, the humanity of the Crown usually suffers his next of kin by nature, though not recognized by the law, to get administration as the appointees

There was originally no representation among collaterals. The novels gave it as far as brothers and sisters children, but this was subsequent to the æra of the institutes.

A mother by the ancient law did not succeed to the estate of her children (16), nor the children

tees of the Attorney General, or of the Crown by letters patent. See 3 P. Wms. 33.

(16) This rule which was also that of our law in ancient times, as to personal as well as real estates, has given occasion to one of the most celebrated wits of modern days, to put in the mouth of one of the pleasantest creatures of his brain, this laughable observation. *I cannot be persuaded*, says he, *but that the Duchess of Suffolk was some relation to her son*. To understand the whole wit of this, the reader must peruse the following ridiculous, but gravely delivered extracts from Swinburne.

“ It hath not only been a question amongst the best
 “ lawyers in the land, whether the mother be of kin
 “ to her child, but after much disputation it hath also
 “ been adjudged in the negative, viz. that the mother is
 “ not of kin to her child, in the case of the Duchess of
 “ Suffolk, in the reign of Edward the Sixth. What
 “ the reasons were, whereby the Civilians were moved
 “ to be of this opinion, I cannot, says Swinburne, easily
 “ conceive, unless it were this, that *Mater non numeratur*
 “ *inter consanguineos*, or unless it were the ancient law of
 “ the Twelve Tables, which excluded the mother from
 “ succeeding

dren to the estate of the mother. But by the Sc.tum Orficianum passed before the institutes. the children were admitted to the benefit of this natural right ; and by the Sc.tum Tertullianum also prior to the institutes, the mother could succeed to the children, but the grandmother could not till the 118 novel.

This law of successions, tho' from it the statute of distributions has by some been said to be copied, and all admit a similarity in many respects, yet contains some striking differences from that remarkable act of our legislature. In the very first step of the latter, where there are a widow and children, the widow has her legal share ; whereas in the Roman law she did not come in until all, even the collaterals were exhausted. So in the next step, viz. where there are no children, she has a moiety, a thing unknown to the Ro-

"succeeding to the inheritance of the son or daughter.
 "But the reasons which moved the temporal lawyers to
 "be of this mind were, First, because lands cannot
 "ascend, and therefore they concluded the same of
 "chattels. Secondly, because the children are of the
 "blood of the parents, yet are not parents of the blood
 "of their children. Thirdly, because the father, mother and child, though three persons, yet are but *una*
 "*caro* one flesh, and consequently no degree of kindred
 "betwixt them."

Quis talia legens—temperet a risu ?

man law : if indeed neither widow nor children, then the next of kin are to be investigated and looked for according to the rules of the Civil law, (and so in looking for an administrator) with this difference only, that with them the ascending line took place of all but brothers and sisters; with us, as we have noted, a collateral in nearer degree takes place of an ascendant in one more remote. We must add to these observations the following; that the half blood is not postponed by us, as with them, and that we admit the husband to succeed to the administration of the wife's personal property, in preference to every other relation; whereas Rome postponed him to them all, with regard to every species of her property (17).

(17) Besides the cases referred to in the foregoing lecture, whoever wishes to be better acquainted with the statute of distributions, which has given rise to as much controversy, and as many doubts as almost any in the statute book, and which lord Hardwicke observes in *Stanley and Stanley*, 1 Atk. 455. to have been most incorrectly penned, would do well to consult amongst others *Pett v. Pett*, 1 Salk. 250. which determined that one brother's grandchildren cannot share with another brother's children. *Palmer and Elliot*. 3 Mod. 51. and *Carter and Crawley*, Raymond 496. in which an ac-

count

Lect
count
law a
tute,
Sir J
it, w
court,
to di
tempo
them
vours
North
Bes
v. Litt
tween
have r
Wit
auter
Spiritu
Dur
and ne
testate,
tions,
They r
* In th
child take
such child
is no dete
where the

count is given of the contention between the common law and ecclesiastical courts which gave rise to this statute, and *Edwards v. Freeman*, 2 P. Wms. 441 *. where Sir Joseph Jekyll states at large the occasion of making it, which was in favour of the practice of the spiritual court, which had endeavoured to force administrators to distribute, but was constantly prohibited by the temporal court, because it would have been allowing them to compel the execution of a trust. The endeavours of the civil courts were truly laudable, yet Lord North ascribes them to sinister motives. T. Raym. 499.

Besides the cases already mentioned, see that of *Bowers v. Littlewood*, 1 P. Wms. 593, which ruled that between an uncle and a deceased aunt's son, the latter shall have no share.

Witter v. Witter, 3 P. Wms. 102. that an estate pur autre vie, is distributable in Equity, tho' not in the Spiritual courts.

Durant v. Prestwood, 1 Atkyn's 454. that aunts and nephews are in the same degree of relation to an intestate, and equally entitled under the statute of distributions, and in such case no right of representation.— They must take per capita not per stirpes.

* In this case and *Wallis v. Hudson* determined that a posthumous child takes under the statute, according to the civil law, which considers such child as born, as to every thing that respects its advantage. There is no determination that half blood should take equally with the whole, where the case is under the statute of James II.

Lecture the Seventh.

OF TITLE BY OCCUPANCY.

THE grand division of titles to things made by Mr. Justice Blackstone, is into those by descent and those by purchase. Justinian divides them into those originating in the law of nature and nations, and those founded on civil, municipal, or positive law.

Under the former he enumerates occupancy, accession and tradition. Under the latter, prescription, donation, succession by descent, by will, or by grant of the *bonorum possessio*.

The doctrines of the civil law on the heads of occupancy, accession, or tradition, have been with his usual perspicuity compared with ours by Mr. Justice Blackstone; and what Justinian says upon them in the 1. chap. 2. book of the *Institutes* is so plainly delivered and so clearly arranged, that nothing but a culpable and ridiculous

Lect. V

culous
structo

He c
and inv

The
der by

which

game

had no

killing

his pu

any bea

ritories

withou

a beaft

was acqu

alive th

if it esc

priation

mum re

mark a

respects

rivers b

public v

(1) Ju

tures wil

culous love of novelty will ever induce the instructor to depart from his order.

He divides occupancy into apprehensio seizing and inventio finding.

The prey acquired by hunting, and the plunder by war, formed the two classes of things which might be appropriated by seizure. Of game laws, it has been observed the Romans had no notion; they knew of no restriction in killing game as to the sportsman or the subject of his pursuit. Every man was at liberty to kill any beast or bird *feræ naturæ* within his own territories, but not upon another man's ground without consent of the owner of the soil. Tho' a beast was wounded in the chase, no property was acquired in it till taken; and in game taken alive there was only a qualified property, so that if it escaped it was liable to seizure and appropriation by the first occupant, unless it had *animus revertendi*, or discovered its owner by some mark annexed to it, as a collar, and in these respects our law agrees; fish, if taken in public rivers became the occupants, but not if taken in public waters or ponds (1).

If

(1) Justinian particularly notices bees among creatures wild by nature, with an attention which should seem

As to seizure in war, it gave in the opinion of the Romans, provided the war was just, (and their ingenuity easily found pretexts for giving it a colour of justice,) an uncontrolled power over the person of the captive : his immoveable property was transferred to the public or conquering state ; his moveables became the spoils which contributed to reward the private warrior (2).

seem to shew that honey was a produce of much more consideration in ancient times than now, and Bracton with a similar attention observes the coincidence of our law, with respect to these animals.

(2) The comparatively mild consequences of war in modern times, shew in horrid contrast the barbarity of the Romans. What should we think of dragging a captive admiral or general at the wheels of a victor's carriage through the streets exposed to the insults of the mob, and then strangling them in prison ; yet such was their conduct, even to wretched princes, and to beautiful queens, from Perseus to Zenobia. Their unrelenting pursuit of Hannibal and Jugurtha are but spots amongst the thousand black instances of the total absence of every spark of generosity from their merciless policy. Surely nothing but the early prejudice excited by the animated colouring and beautiful compositions of their wonderfully able writers could make us speak of the moral character of such a nation with enthusiasm and admiration, much and justly as we may praise their laws, their taste and their genius.

If

Left. V

If a
robbers
or reco
of this n
was or v
original
44. (3).

Inven
never h
as for ex
island, c

(3) Fro
recapture
ed into th
or state, l

fra presid
vests the
wards in b

de Jure M
The Civ
be a firm p
the enemy,
but this is
this point
v. Withers
admiralty a
fore senten

If a man's goods were taken from him by robbers or enemies, and afterwards recaptured or recovered, they became or not the property of this new seizer or occupant, according as there was or was not at the time a possibility left for the original owner to recover them. See Dig. 41. 1. 44. (3).

Invention or finding, was either of things that never had been in the possession of any person, as for example, a newly discovered uninhabited island, or of things of which tho' once appro-

(3) From this rule may be deduced the principles of recapture with us, which are, that if the prize be carried into the fleet, or into a haven belonging to that prince or state, by whose subjects the same were taken, *i. e. infra presidia hostium*, such a possession by the enemy divests the owner of his interest, and the retaking afterwards in battle gains the captors a property. See Molloy de Jure Maritimo. lib. 1. cap. 1.

The Civilians held, however, that this possession must be a firm possession, *i. e.* the prize must *pernoctare* with the enemy, or remain in his possession twenty-four hours, but this is not the modern practice of our law. See this point most ably discussed by lord Mansfield in Goss v. Withers, 2 Burrow 694 and 683. where he says, our admiralty anciently held the property not changed, before sentence of condemnation.

O o

priated,

priated, the owner could not now be found. In both instances the Imperial Law, in pursuance of the law of nature, gave the property to the first occupant—the laws of England give it *generally* to the king (4).

Of the latter species, the most remarkable besides waifs and estrays, are treasure trove, and wrecks.

Treasure trove, when the owner could not be discovered, belonged, by the civil law, to the finder, if found on his own or on unappropriated ground. If upon the land of another, the law made a distinction between the discovery produced by accident and by search, giving in the former case half, in the latter the whole to the owner of the soil, Dig. 41. 1. 31. 1. Code 10. 15. Inst 2. 1. 39. A tenant for long term of years, was considered as lord of the soil,

(4) *Generally* is added, because there are exceptions, E. G. tho' treasure hidden *in* the earth, afterwards discovered (the owner not appearing) belongs to the king, yet treasure trove, if found *on* the earth or in the *sea* would belong to the finder. Dr. Christian, indeed, insists that the general rules of our law respecting bona vacantia agree with the civil, and that the king's rights are the exception.

and

Lect. V.

and he,
the ben
extende

Wrec
wreck, r
lord of t
and alive
ticular
meddle v
ing the p
claring t
original
(6), unl

(5) Wi
within th
lead, iron,
mines on
in Ireland
served, to
and work
other purp
king, and
by grant f
general gr
336.

(6) See
Dig. tit.

and he, not the lord or proprietor, was to have the benefit of the discovery. The same rules extended to newly discovered mines (5).

Wreck.—The Rhodian laws having in case of wreck, made the ship and goods seizable by the lord of the place, tho' all the persons were saved and alive; therefore the Romans were more particular and express in forbidding any man to meddle with such goods as were wrecked, in making the plunderer to return fourfold, and in declaring that they remained the property of the original owner, without escheating to any body (6), unless for want of claim within a year and a day;

(5) With us, if a man grants his lands, all profits within the bowels of the land pass, as mines of tin, lead, iron, coal, &c. Co. L. 4. a. If he let his land, open mines on it pass, 2 Lev. 185. we have numerous statutes in Ireland made to enable landlords, where mines are reserved, to enter upon demised lands, in order to open and work mines under certain restrictions, and for various other purposes. Mines of gold and silver belong to the king, and a subject cannot have such royal mines but by grant from him, and that in express words, for a general grant of mines would not pass them, Plowden 336.

(6) See Lib. 14 Dig. de acq. rer. dom. and see lib. 47. Dig. tit. 9. de incendio, ruina & naufragio. Read

a day; in which case by that law also they escheated to the Exchequer.

By *derelicts* were meant in the Roman law, things voluntarily abandoned with intention to leave them for ever (7). Things therefore thrown
away

also the *lex Rhodia de Jactu* in the 14th book of the *Pandects*, and compare it with Molloy's Chapter on Average and Contribution. 4 Inst. 134. Court of Admiralty has no jurisdiction of wreck, but of *flotjan* it has, *if super altum mare*. Every one knows how much the ancient English law of wreck (which at first coincided with the Rhodian law—and afterwards only exempted the wreck from the claims of royal prerogative in case some creature escaped alive) has been mollified in modern times, so that any sufficient proof of the property of the goods, tho' no living thing escape, is sufficient to prevent their being forfeited as wreck, provided the owner asserts his property within a year and a day: there have been besides various acts passed to punish secreters or plunderers of wrecks and regulating salvage: the principal salvage acts in this country were made in 4 Geo. 1.—11 Geo. 2.—17 Geo. 2.—32 G. 2.—15 & 16 G. 3.—and 23 & 24 G. 3. For the four sorts of ship-wreck goods, *Jetfan*, &c. &c. see 2nd. Inst. 167.

(7) *Derelicts*, says Harris, are by us called waifs and estrays; surely not, as appears from the description which stared the learned commentator in the face in that text to which he has affixed the note.

On the contrary, Wood says, we have no *derelicts*; for tho' a man so abandon his property, he may change
his

Lect. V.

away from
storm,
were no

The
a very d
reliction

If no
Law ter
them to
case they
an estate

After
cession,

Natur
thus titl
the young
vion, or
ed up by

his mind
certain len
would con
donment o
discussion.

(8) If
tion of the
gradual and

away from necessity, as to lighten a ship in a storm, or things lost by negligence or chance were not derelicts. 2. Inst. tit. 1.

The term derelict is applied in our law, but in a very different sense, to lands gained by the dereliction of the sea, which belonged to the king.

If no owner was found for lands, the Civil Law termed them *hæreditas jacens*, and gave them to the first occupant. With us in such case they go to the king, except in the case of an estate *pur auter vie*.

After occupancy, the Civil Law considers accession, which was natural, artificial, or mixt.

Natural accessions were, First, By procreation; thus title arose to the offspring of slaves, and the young of brute animals. Secondly, By alluvion, or secret insensible addition of earth, washed up by the sea or a river (8). If indeed the impetuosity

his mind and reclaim it again; perhaps so, but after a certain length of time, after a year and a day his claim would come too late: however, such voluntary abandonment of property is too imaginary to require much discussion.

(8) If lands are gained by the alluvion or dereliction of the sea or of a river, our law, if the increase be gradual and imperceptible, gives them to the owner of the

impetuosity of a river tore away a portion of ground, and joined it to a neighbour's estate, it did not become his until it had indissolubly coalesced. Thirdly, By the rising of an island in a public river or the sea, a case which, however uncommon except in volcanic countries, our law has in its accuracy not forgotten (9). Fourthly, A river forsaking its natural channel, which is then divided between the owners of the adjacent lands,

Artificial accessions were,

1st, Specification.—The original owner of any thing improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes.

The species, however, must be incapable of being restored to its ancient form; not such for

the land adjoining, if rapid to the king. I have observed in an introductory lecture, that such events in torrid regions, where Ganges rolls his rapid stream, are much more frequent than in these countries, where the subject may appear rather immaterial,

(9) Giving the property to the king, and not to the occupant as the civil law did.

instance

instance
down;
in ignor
ther. (1

2nd,
to a ful
before,
another
parchme
the acc
whole b
tho' the
purple
be carri
but tho
lost, as
action l
and rest
be comp
was mad
accessary
the value

(10) M
in his deli

(11) Ou
page 404.

instance as a wrought vessel that could be melted down; and the materials must have been taken in ignorance of their being the property of another. (10)

2nd, Adjunction.—When something is added to a subject more than is in it, or than it had before, as embroidery to a garment, building on another man's ground, writing on another's parchment. The general rule here was, that the accessory follows its principal, and that the whole belongs to the owner of that principal, tho' the accessory be of greater value; thus the purple superadded to a coarse garment, would be carried with it to the owner of that garment, but tho' the property of the thing added was lost, as long as adjunction continued, yet an action lay to have the thing added, separated and restored, or if that could not be done, to be compensated in damages. If the adjunction was made by mistake, and by the owner of the accessory, he might keep possession until paid the value of the thing added (11).

These

(10) Mr. Justice Blackstone omits these two requisites in his delineation of the civil law upon this subject.

(11) Our law agrees. See Dr. Christian's note to page 404. 2 Bl. Com.

These principles, as they give trees planted, corn sown, and buildings erected, in and upon the land of another to the owner of the land, so do they give to the owner of paper or parchment the writing thereon, meaning surely, says Sir William Blackstone, only the mechanical operation of writing, for says the learned Judge, the same law, where a painting has been done on another man's canvas, gives the canvas to the painter. I am very willing to admit the argument, that this respect to works of genius and invention in one case implies it in the other; and very unwilling to admit an interpretation fraught with such absurdities as the contradictory of this opinion; yet Ayliffe and Wood have understood the following paragraph in its literal sense; *Si in chartis membranisque tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris* (12); and Justinian allows, that previously to his time, there had been a great dispute, whether the most valuable picture should not cede to the ownership of the canvas.

(12) Inst. 2. 1. 33. Titius answers to the J. S. of our law writers. The Romans have been perfectly silent on the subject of literary property.

It

Lect.

It m
ing, p
ground
the cro
workm
were e
true ti
Conf
This if
and fo
separat
meant
commo
dent, t
propor
value t
termix
one m
tion of
him wh
tisfacti
what h
Mixt

(13)
fraudule
other ref
this subj

It must be noted, that in the instances of building, planting or sowing, tho' the owner of the ground became master of the house, the tree, or the crop, yet he must pay for the materials, the workmanship, the seed, and the labour, if they were expended thro' mistake and in error of the true title, as common justice evidently required.

Confusion.—Which meant a mixture of liquids. This if made by consent became a mixed property, and so if by accident, unless there could be a separation without any prejudice. **Commixture** meant a mixture of solids, which could not be in common unless by general consent; if by accident, the heap was to be divided as nearly as the proportion of each man's property or of the value thereof could be ascertained. If the intermixture was occasioned by the wilful act of one man, without the knowledge or approbation of another, the sole property was given to him who had not interfered in the mixture, satisfaction however being allowed to the other for what he had had lost (13).

Mixt Accession.—The most remarkable title

(13) Our law allows no such satisfaction to such fraudulent or officious or mischievous intermixer; in other respects it pretty much agrees with the Civil on this subject. See Bl. Com. 405.

P p

acquired

acquired in this mode was to the profits of an estate possessed by a man bona fide, on an erroneous supposition of a title to the land, which in reality was not valid (14).

To accession the Civilians refer the law of fixtures, here observing the usual principles of accession by permitting the possessor to take away what has been erected or made by him, if it can be done without prejudice to the rights of the proprietor, or at least giving the former a right to demand retribution to the amount of their value (15).

To these original methods of acquiring property by the law of nature and nations, viz. occu-

(14) Every body knows the difference of our law upon this subject, and that the possessor, however innocent, must account for the profits, and indeed the Roman law meant only that he should not pay for the produce of the ground actually consumed, and not that he should not account for rents received, &c. &c.

(15) See Dig. 25. Lib. and Wood, p. 96, octavo: the English lawyer knows how much our rules with respect to fixtures, (which formerly were considered as immovable, having become part of the house or building, 1 Inst. 53. a.) have been relaxed of late years, a tenant for instance having been permitted to carry away not only things relative to trade, as mills, brewing vessels, &c. &c. but even marble chimney pieces, &c. &c.

pancy

pancy and accession, the Civilians add a third from the same sources, which they term derivative, viz. *tradition* or *delivery*. But as delivery seems to be more properly referred to modes of conveying, than to origination of property, since the title is by the grant, of which the delivery is evidence, and to which it ought to be a concomitant, I shall beg leave to consider it under the head of title by alienation, tho' I do not deny that delivery by the Roman Law was very often essential to the completion of the title, but it was not universally. [16]

(16) For instance it was disputed whether legal delivery in its commencement was a requisite to title by prescription, Ayliffe 324 ; for the rules respecting delivery and things to be considered therein, see Wood, p. 101. Ayliffe, 297. the property of things sold was not transferred without delivery.

Lecture the Eighth.

OF TITLE BY PRESCRIPTION, ESCHEAT, FORFEITURE AND ALIENATION.

PRESCRIPTION (1), or the acquisition of property by continuance of possession, is evidently a creature of municipal law, since no length of time could by the law of nature alter or divest a right once acquired. It originated, says Wood, with the Greeks; the divine law forbid it, as well as perpetual alienations.

(1) The title of prescription, says Blackstone, was well known in the Roman law, by the name of *Ufucapio*, vol. 2. ch. 17. The Roman law however distinguished between *ufucapion* and prescription; applying the former to things moveable, the latter to immoveables; and surely there is a great dissimilitude between the Roman prescription and ours, as that of the Civil Law was applicable to lands, and not from time immemorial.

Under

Lect. V.

Under

however

whethe

incorpor

limitati

(2) whi

length o

prescrip

able, ter

real, if t

seffor w

vince (

bited a c

Prescr

rial usag

(2) Ou

can give

give a tit

ing any f

of little in

the same

lands by i

years poss

shall be a

(3) Th

tom. He

Ecclesiasti

if they at

Under the name of prescriptions, the Romans however, included not merely title to property, whether moveable or immoveable, corporeal or incorporeal, from length of possession; but also limitation of suits, and even of personal actions, (2) which were barred or prescribed against by length of time. The time which gave a right to prescription, was three years for things moveable, ten years for things immoveable or incorporeal, if the person claiming right against the possessor was present, *i. e.* resided in the same province (3), twenty if he was absent, *i. e.* inhabited a different one.

Prescription therefore with them was not immemorial usage, but a certain length of possession.

(2) Our law undoubtedly declares, that no prescription can give a title to lands, but as length of possession can give a title to lands, by ousting the possibility of bringing any suit to recover them, it seems to be a declaration of little import, and indeed rather an odd provision, since the same law in fact says, no man shall claim a title to lands by immemorial usage of holding them, and yet 60 years possession of lands in fee simple uninterruptedly, shall be a title against all the world.

(3) The Civilians allow ten years also to make a custom. Hence the Temporal Courts will not suffer the Ecclesiastical to try a custom, and will issue a prohibition, if they attempt it.

To

To make a valid prescription four things were requisite, besides the period of time ordained by law.

First, That the possession should have been originally obtained honestly and bona fide, as far as regarded the mind and intentions of the purchaser, though he might have been mistaken in his title, or that of the vendor. And the Canon Law did away the prescription, if at any time the purchaser became really connusant of his original error, and the consequent imperfection of title.

Secondly, That the possession was acquired for a lawful consideration, as by donation, purchase or succession, *i. e.* for such a cause as would entitle the receiver to the property, supposing the person from whom he received it to be the true owner; a tenant therefore could not prescribe against his landlord, nor the possessor of a thing lent or deposited against its true and rightful proprietor.

Thirdly, Uninterrupted possession. Interruption of possession was called usurpation (4), and was either natural or civil. The former consisting in entering into and upon immoveable

(4) A term frequently introduced into the Ecclesiastical law.

things, the latter in taking away those moveable. Civil interruption was the interposition of a legal claim in a court of justice.

* Fourthly, The thing must be capable of prescription. Things sacred and consecrated to God were not liable to prescription, and the same exception held as to the domains of the Prince (5). The property of minors, of soldiers upon expeditions, and of persons absent on the business of the Commonwealth enjoyed the same privilege; and the subjects prohibited to be alienated by will, were incapable of being vindicated by pretence of possession.

I have said, that under this head, the Civil Law considered limitation of actions. Real actions, by which the Civil Law meant all actions for the recovery of property (6), brought by a man demanding some thing that was his own, and founded on dominion, or *jus in re*, were of course limited as to the time of bringing them, by the respective periods which formed valid prescriptions in the respective cases mentioned above.

Personal

(5) Thus in our law, *Nullum tempus occurrit ecclesiæ.*
Nullum tempus occurrit regi.

(6) The meaning was not restrained to the recovery of what we call real property, the Romans knowing no such distinction:

Personal actions, or those in which a man claimed a debt or duty and which were founded on obligation or *jus ad rem*, and mixed actions in which some specific thing was demanded, and some personal obligation also claimed to be performed, must regularly have been brought within 30 years. Code 7. 35. 5. to this however some exceptions are found in the same book of the Code in its 39 Title: and the ninth of the Novels, allows the Church to bring such actions at any time within the period of 100 years from cause accrued.

The Civil Law also established a limit to the bringing or prosecuting of criminal proceedings, the right of accusing being ordinarily limited to 20 years, and the ordinances of Scotland have followed this example (7).

ESCHEAT.—This title, in our strict legal sense of it, was unknown to the Romans, and in a more extended one takes up such little space in the Civil code, that it is scarcely visible, which is not surprising, since as Sir William Blackstone observes, escheat, strictly speaking, was one of the fruits and consequences of feudal tenure: as far, distinction: As we have often observed, their grand distinction was into moveables and immoveables.

(7) Quere whether such limitation be not founded in reason.

however

Lect.
howev
of de
count
vifion
ted; r
sufficie
howev
dal lon
I sha
comme
the sev
be defi
right to
Exched
consequ
mount,
in the p
mention
ing a d
this de
ture, w
being ex
(7) It
originally
erarium
subsequen
privy pur

however, as it denotes an obſtruction of the courſe of deſcent, which muſt frequently happen in all countries, and is therefore a caſe requiring proviſion in all laws, it muſt not be entirely omitted; nor is it diſregarded by the Imperial Law, ſufficiently attentive to the rights of the crown, however unacquainted with the claims of the feudal lord.

I ſhall, therefore, in imitation of the learned commentator on the laws of England, conſider the ſeveral caſes in which hereditary blood might be deficient according to the Civil Law, and a right to property thereby become veſted in the Exchequer (7), not like the modern eſcheat in conſequence of any feignory or lordſhip paramount, but as the fruit of prerogative exiſting in the prince. The want of heirs I have already mentioned in the chapter of Deſcents as occaſioning a devolution of property to the throne: to this deficiency according to the courſe of nature, we muſt add unnatural births,—monſters being excluded from ſucceſſion by their law as

(7) It may be remarked here once for all, that *fiscus* originally ſignified the proper money of the Prince; *ararium* the public treaſure. But the latter meaning in ſubſequent times was annexed to *fiscus* alſo, and the privy purſe was denominated *patrimoniale*.

well as our own; the Civil, however, accounted them children, as far as related to any privilege of the parent, such as the *jus trium liberorum*, whereas ours will not permit such an offspring to entitle the father to be tenant by the curtesy (8). I have also noticed in the chapter on Marriage the legitimization of bastards produced by subsequent wedlock; and have elsewhere marked the admission of the concubine and her son to one-half of the inheritance where no lawful wife or child, and the succession of the bastard to the mother's inheritance altho' she was never married, tho' not to the father's (9). With these exceptions bastards at Rome were, as well as bastards in Britain, incapable of inheriting. But the offspring of incestuous marriage, or of adultery, could not inherit even to the mother (10). Aliens also were incapable of being devisees, as well as, of being heirs; since the general principle of the Civil Law was, at least till the time of Antoninus, that foreigners had no right to the laws or privileges of any particular place where they sojourned (11), and the cruel

(8) See F. f. 1. 5. 14. Co. L. 29.

(9) See note to p. 186.

(10) Nov. 89. ch. 15.

(11) See Ayliffe, book 2. lib. 3. and l. 1. Code de hæ. ins.

incapacities

incapacities of succeeding to them, or the Droits D'Aubaine, formerly known to France and Holland, are said by Domat to have originated in the Civil Law (12).

The doctrine of escheat by corruption of blood would in vain be looked for in the Imperial Law. It came into England with the conquest, and was unknown even to the Saxon tenures.

FORFEITURE.—But tho' escheat, in consequence of crimes, is a creature of modern times; yet forfeiture of property for offences was familiar to the Romans and indeed incident to all capital offences, until Justinian moderated the severity of the law in certain particulars (13). Of the other causes of forfeiture enumerated by the English law, the most remarkable are lapse, simony, and bankruptcy.

The

(12) See Aylyffe, book 3. lib. 25. *vacantia mortuorum bona tunc ad fiscum jubemus transferri, si nullum ex qualibet sanguinis linea vel juris titulo legitimum reliquerit intestatus hæredem.* But the treasury was barred by non claim during four years, and in several excepted cases did not come in at all; the church being preferred if the deceased had been a clergyman, and any corporation if he had been a member thereof.

(13) The alterations by him made will come properly under the head of Public Wrongs. It is worthy of the

The right of lapse having been established about the time of the Council of Lateran, as late as the reign of our Henry the second, of course is unnoticed by the Imperialists, and the law of simony must be traced thro' the provisions of a different jurisprudence, that of the Canonists (14).

Bankruptcy.—This title is noticed in the 3d. book, 26th title of the Institutes under the name of *Cessio bonorum*. Bankruptcy thro' vice or folly was declared infamous and generated infamy at Rome; and fraudulent alienations to prevent its

Civilians observation that with us the goods of traitors, and felons, &c. &c. found within the Admiralty jurisdiction, are droits or perquisites of the Admiralty, so are wrecks, jetfan, flotsan, ligan, derelicts, and deodands, not granted to the lords of manors, or others; and so are all the goods of the King's enemies taken without commission, or found or by accident brought within the Admiralty commissions. See Comyns Admiralty D. and the cases there referred to. There have been of late some important questions respecting the droits of Admiralty in Ireland, which are not yet decided.

(14) The common law of England has not considered simony in the light of a spiritual crime, (under which consideration it has left it to ecclesiastical censures) but merely as the source and cause of invalidating agreements
tainted

its effects, and attempts of debtors to defeat their creditors were guarded against by provisions which may be found in the forty-second book of the Pandects, 8. 10.

All persons who became insolvent and fraudulently concealed or absented themselves, became bankrupts at Rome, whether traders or not; they were called decoctores, and the method of proceeding against them is pointed out in the forty-eight book of the Pandects, 17. 5. If they became bankrupts thro' their own vice or folly, they were expelled from the college of merchants and not suffered to trade again. Bankrupts from riotous living were put to hard labour for their creditors, and knavish bankrupts concealing their effects were punished with death. If bankrupts became so by real misfortune, on delivery of their effects, the debts to answer which they were not adequate were postponed; but the taint by it. The statute law however of that country has by provisions *not yet introduced into Ireland* imposed pecuniary penalties on the parties concerned in such corrupt agreements; the ecclesiastical courts in punishing it, are guided by the canon law as far as received in these countries, but the limits of this reception do not seem to be accurately ascertained, for instance, whether they extend to *resignations*, has been lately made a question in Ireland.

fruits

fruits of their future industry remained always liable (15).

Alienation.—I shall here consider who might alien and to whom, what things were unalienable, and how a man might alien.

All persons might alien their property who were not under some special disability created by the law; these disabilities therefore are the chief matter for our consideration. The 8th division in the second book of the Institutes bears this title, *Quibus Alienare Licet vel non Licet*. It begins with the husband, who could not alienate lands which came to him in right of his wife as a marriage portion; and then proceeds to mention the mortgagee, who, tho' not owner of the pledge may sell it, and the minor, who, tho' master of his fortune, cannot alienate any part of it without the consent of his guardian. This however is a very imperfect enumeration of the

(15) Not the whole fruits, but as much as they were able to pay, see 4th book of the Institutes, 6. 40. What merit should be allowed to the framers of our Bankrupt Laws, will be evident on perusal of the text above, and how little their invention, was put to the rack, having the Roman law before their eyes, from which they borrowed almost every idea. See Ayliff, 347.

persons

Lect.

perfor

we m

sons

traitor

der al

until A

to all

This

all thi

proper

could

Law w

call ch

to be

those a

pute) c

As t

student

convey

(16)

sons afte

sons att

bited to

(17)

it might

the chur

fasticis :

meaning

before.

persons forbidden to alien by the Civil Law, for we must add ideots, lunaticks, prodigals, persons banished during their life, hereticks and traitors (16). Aliens appear to have been under almost every disability known among us, until Antoninus communicated the *jus civitatis*, to all the inhabitants of the empire.

Things sacred and religious, and in general all things *not in commerce*, and the goods and property of the Church, and the crown lands, could not be alienated (17), and the Civil Law was particularly careful to prevent what we call champerty, by forbidding things litigious to be alienated, (meaning by things litigious those about whose property there was any dispute) during the time of the contest.

As to the modes of transferring property, the student must not expect to find precedents of conveyances as he would in the common law-

(16) See Pandects 36. 5. 15. that condemned Persons after sentence could not aliene. Ideots, infants, persons attainted of treason or felony, are prohibited to aliene by our law.

(17) If it came to the church from a private donor, it might be alienated from necessity, to pay the debts of the church. See Nov. 7. *de non alienandis rebus Ecclesiasticis*: as to crown lands. See Code 11. b. 2. The meaning of things *not in commerce* has been explained before.

yers

yers library, nor has the Imperial Law gone into a detailed account of different species of deeds in the manner pursued by Mr. Justice Blackstone, but it said in general, that things must be transferred by delivery, and distinguished delivery into true and feigned.

True delivery was handing over the thing if moveable, and giving possession of it if immovable. Possession of part might be given in the name of the whole, and by proxy, as well as by the owner himself (18). Feigned delivery was when the intention of the testator being sufficiently expressed, a solemn delivery was supposed, tho' not actually made, which fiction was peculiarly necessary in passing incorporeal estates. Thus a feigned delivery might be made by delivering a deed containing the description of the thing intended to be conveyed (19). Thus delivery of the keys gave a possessory right to a house, and even verbal delivery of the possession of lands at a distance, if within view, was a good delivery of them (20).

(18) See Inst. 2. 1. Dig. 41. 2. 3.

(19) This effect of deeds in the Roman law is particularly recognized in Code 8. 54. 1. where they are called *instrumenta*.

(20) Dig. 41. 2. 18. 2. it was called the *fictio brevis*.

The

The Private written instruments chiefly noticed by the Civil Law are *cautio*, a note or bill for money received; *apocha*, the creditor's receipt or acquittance on the debt being paid; *antapocha*, a tenant's acknowledgment that he had paid rent to a landlord, seemingly intended for the same purposes with our attornment; *literæ*—letters, commendatory, testimonial or credential; *Chirographa*, which may be compared with deeds poll, and *Syngrapha* which answered to deeds indented (20).

manus, if goods being already in a man's possession as a pledge or loan were afterwards given or sold to him; if the thing was shewn at a distance it was delivery *longa manu*. If some token was delivered, as a key or a deed, it was called symbolical. But upon symbolical deliveries see the dicta of Lord C. in Ward and Turner, 2nd Vesey.

(20) *Syngrapha* are mentioned by Cicero and Plautus, in the latter, tho' poetical authority may not be very good in such cases, is one of the few precedents of them handed down to us. *Chirographa* are spoken of by Juvenal. As to *facta* for deeds, and *dimissio terrarum* for a lease, they are phrases of modern corrupted latinity.

Lecture the Ninth.

OF TITLE BY GIFT; INTER VIVOS, MORTIS CAUSA, AND PROPTER NUPTIAS.

GIFTS were by the Romans distinguished into proper and improper. The proper gift, or donatio inter vivos, was when one out of mere liberality and urged by no other motive, bestowed any thing upon another. The improper when his liberality was urged by the prospect of death, or elicited by reason of marriage.

The student will be surprized to find the Civil Law elaborate and prolix on the subject of gifts inter vivos, which by ours are little noticed, or confounded with grants, but I should think his time mispent in examining this head further

further than to note the following peculiarities (1).

Gifts were revocable for three causes only (2).

First, where the Gift was inofficious, viz. depriving the next of kin of their equitable share.

Secondly, for ingratitude to the Giver, the degree of which however was not left to be determined by fancy, but ascertained by Law, and limited to five Instances, viz. defamation of the character or assault of the person of the giver, snares against his life, injury to his property, or refusal to fulfill agreements entered into at the time of the gift. See Code, 8. 5 b. 10.

Thirdly, If the giver afterwards happened to have children (3).

If the gift exceeded the value of five hundred crowns, it must have been publicly registered

(1) He may compare these gifts however with our voluntary settlements, or gratuitous bonds.

(2) With us a gift absolutely made, without providing a power of revocation, cannot be recalled, but see the Case of Naldred v. Gilham, 1 P. Wms. 577.

(3) Compare with this provision the various cases in our report books, respecting revocation of wills, by marriage or the birth of a child.

at the time of the gift made, (4) with certain exceptions mentioned in the eighth book of the Code, among which were gifts made by the Emperor or to him, but latterly the conduits of his liberality were confined to publick instruments, subscribed with the royal signature and attested by Witneses. Persons doating, madmen, prodigals and minors, were not capable of making gifts; nor persons born deaf and dumb, nor married persons to each other, as we have noticed before in the lecture on marriage; a son under the father's power was not capable of receiving a gift to his own use, for he could only take for the father's benefit: things sacred or public could not be made the subject of a gift, nor could as it should seem contingent rights. See 8 lib. Code. 24, 39, and 42, of the Pandects.

DONATIO MORTIS CAUSA. The seventh title of the second book of the Institutes, and the sixth chapter of the thirty ninth book of the Pandects have for their subjects *donationes mortis causa* and are to be particularly recommended to the student's perusal. The definition given in the latter is this: *mor-*

(4) Code 8, 54. 27. here is one instance of a public registry of deeds at Rome; in France the law was the same. Groenweg.

tis

lis causa donatio est, cum quis magis habere se vult, quam eum cui donat, magisque eum qui donat, quam heredem suum (5). It then enumerates three species of these donations, one induced by no apprehension of present danger, but merely by the general consideration of mortality; another when a person apprehending imminent danger so gives, *ut statim fiat accipientis*; the third, when any one induced by danger does not give so that the property should pass at the time, but only when death shall have followed, *tunc demum cum mors fuerit secuta*: and it observes that these inducements may be not only ill health, but impending danger from an enemy, from robbers, or from the hand of power, or a projected journey or voyage, or even weariness of life, occasioned by extreme old age (6.)

The

(5) It gives as an instance the gift made by Telemachus to Piræus in Homer. *Odyssey*, book 17.

(6) In Ward and Turner, 2 *Vesey*, 431, Lord Chancellor Hardwicke takes notice of the three kinds of *donationes mortis causa*, and thus describes them. The first is a donation by one in no present danger, but in consideration of mortality if he died, and this is strictly compared to a legacy, for the property was to pass at the death, not at the time; the second kind is, where the

The Institutes without making this triple division of such donations, preface the same general

the property passed at the time defeasible in case of an escape from that danger in view, or of a recovery from that illness; the third was where though he was moved with that danger, yet not thinking it so immediate as to vest the property immediately in the person, he put it in possession of that person as an inchoate gift to take effect in case he should die.

In Tate and Hilbert in 1793, 2 Vesey Jun. 111. the Lord Chancellor seems to understand the two first species in a different sense, and says, they were evidently mere donations, and according to a note which I took in Bilby and Coulter in the Exchequer in Ireland, 1791, that court seemed also to consider the two former as in fact and effect, donations inter vivos. The truth is, the Roman lawyers seem to have fallen into a confusion of expression, by considering gifts to take effect presently and irrevocably as *donationes mortis causa*, if they were made while under apprehension of danger of death. To correct this the Dig. lib. 39. c. 27. says, *ubi ita donatur mortis causa, ut nullo casu revocetur, mors causa donandi magis est quam mortis casu donatio: et ideo perinde haberi debet, ac alia quævis inter vivos donatio. Ideoque inter viros & uxores non valet.* And Swinburne, page 23, says, the last kind of gift and not the first is that which is compared to a legacy, but the other two are reputed simple gifts,

if

neral
mortis
suspicion
sibi con
vixisset
tionis p
tum sit.

The
after th
prevent
gifts, t
with do
Whethe
gifts m
on whi
agreed,
different
lute del
the first

if the giv
and so th
Heinecciu
that were
among do

(7) In
431, in

neral definition by another more particular ;
*mortis causa donatio est, quæ propter mortis fit
 suspicionem cum quis ita donat, ut si quod humanitus
 sibi contigisset haberet is qui accipit ; si autem super-
 vixisset is qui donavit reciperet, vel si eum dona-
 tionis pœnituisse, aut prior decesserit is, cui dona-
 tum sit.*

The Institutes therefore which were published after the Pandects seem to be thus particular to prevent the confounding absolute irrevocable gifts, tho' made under apprehension of death, with donationes mortis causa, properly so called. Whether delivery was necessary to make these gifts mortis causa good and valid was a question on which the Civilians seemed not to have agreed, but Lord Hardwicke has reconciled their different opinions (7), by shewing, that an absolute delivery of possession was not requisite to the first or third kind of gift before mentioned, but

if the giver do not make express mention of his death, and so they cannot be revoked. And it appears from Heineccius Antiq lib. 2. tit. 7. sec. 19. that some gifts that were irrevocable were at Rome improperly ranked among donationes mortis causa.

(7) In the aforesaid case of Ward v. Turner, 2 Vesey, 431, in which case says Mr. Cox, in those excellent
 notes

but that in the second case, where the property was to pass immediately, it was required (8.)

All persons were capable of receiving donations *mortis causa*, that were capable of receiving legacies, and he who might make a testament might also make a donation *mortis causa*, and a *filius familias* who could not make a testament, even with the consent of his father, could make a *donatio mortis causa*, his father permitting.

It was necessary to mention at the time, that the gift was made in contemplation of danger or of death: it must also have been made in the presence of five witnesses (9); But it was not essential that it should have been made in the

notes on P. Wms. which have done him so much honour, all the law upon the subject of donations *mortis causa* is collected.

(8) But by the Civil Law as received or allowed in England, and consequently by the law of England, says Lord Chancellor in the same case, delivery is necessary to make good a donation *mortis causa*, and since delivery is necessary, of course the thing must be capable of delivery, and questions have naturally arisen in our law are, whether there has been a sufficient delivery or not.

(9) This is not requisite with us.

donor's

Lect. I.

donor's
donee

39. 6. 3

In the
the husband
not found
impossible
gift (13)

(10) '
previously fa
Vesey, J

(11)
presens p
Lawson a
that be n
be necessa
and Smit

court of
in 1791,
which ca
has given
Cases in t

Heinec
absolute
nationes r

(12) S
Wms. 44

(13) N

donor's last illness (10). The presence of the donee seems to have been necessary, from Dig. 39. 6. 38. (11).

In the donation *mortis causa*, strictly so called, the husband could give to the wife (12); I have not found any mention in the Civil Law of the impossibility of annexing any condition to the gift (13), nor any discussion of the distinctions
between

(10) This appears to be essential with us, and is expressly said to be so in Blount and Burrow, 546. 1 Vesey, Jun. and in Millar and Millar. 3 P. Wms. 356.

(11) It is there said *mortis causa donatur quod presens presenti dat*; and the Master of the Rolls in Lawson and Lawson, and 1 P. Wms. doubts whether that be not the case with us. But it does not seem to be necessary, by the determination in the case of Drury and Smith, 1 P. Wms. and by what was said in the court of Exchequer in Ireland, in Bilby and Coulter in 1791, according to a note I took at the time, of which case a much respected friend, Mr. Ridgeway, has given a report in a note to his edition of Reports of Cases in the time of Lord Hardwicke.

Heineccius Antiq. lib. 2. tit. 7. observes, that some absolute irrevocable gifts had been classed under *donationes mortis causa*.

(12) So he can with us. Lawson and Lawson, 1 P. Wms. 441.

(13) No condition can be annexed to it according to

between things capable or incapable of delivery in this mode of giving.

Though

our law, otherwise a testamentary disposition might be grafted upon it and the statute of frauds evaded; in the case of *Lawson and Lawson*, the Master of the Rolls declares, that no such gift, tho' in nature of a legacy need be proved in testamentary form, it operating as a declaration of trust upon the executor. On the impossibility of annexing any condition to a *donatio mortis causa*, rested the determination of the court of Exchequer in Ireland, in 1791, in the case of *Bilby and Coulter*, in which the superior knowledge of the Imperial law, possessed by the great and able judge who presides on that bench was so eminently conspicuous.

For what things are so capable of delivery with us, and for other questions respecting donations *mortis causa*, see *Ward and Turner*, 2 Vesey 431. *Lawson and Lawson*, 1 P. Wms. 441. *Drury and Smith*, 1 P. Wms. 404. *Millar and Millar*, 3 P. Wms. 356. *Snellgrave v. Baily*, 3 Atkyns 314. *S. C. Ridgeway's cases* in Lord Hardwicke's time, and *Bilby v. Coulter*, in his note thereon. *Jones and Selby*, Prec. in Chan. 300. *Tate and Hilbert*, 2 Vesey, jun. 111. a bond, bill or note, payable to bearer is a good subject of a *donatio mortis causa*. But not other promissory note or bill of exchange. Delivery of receipts for South Sea annuities not sufficient, *Ward and Turner*. There can be no such donations of simple contract debts or arrears of rent, because

Though
man law
most of
settled in
should
omnia, ye
gacies in

First,
he could
donatio m
Second
delivered
times by
heir.

Thirdl
account
Ayliffe p.
DONA
donatio p
to the w
brought
lent to it

cause there
case.

In Tate
whether w
supplied by

Though after a long contest among the Roman lawyers, whether these donations partook most of the nature of gifts or legacies, it was settled in the Institutes, 2 Lib. 6. 7. that they should be *ad exemplum legatorum redactæ per omnia*, yet, says Ayliffe, they differed from legacies in the following respects.

First, as we have said, a filius familias, tho' he could not bequeath a legacy, could make a *donatio mortis causa*.

Secondly, These donations were sometimes delivered by the person in his life time, sometimes by his heir, but the legacy always by the heir.

Thirdly, The donee was obliged to render an account of his possession, not so the legatee. Ayliffe p. 332.

DONATIO PROPTER NUPTIAS]. The *donatio propter nuptias* was a security given to the wife, for the return of the fortune she brought with the husband, or of an equivalent to it, in case she survived him, or if they

cause there can be no delivery, said by L. C. in same case.

In *Tate v. Hilbert*, Lord Chancellor is made to doubt, whether want of delivery might not in some cases be supplied by deed or writing, tho' it could not by parol.

S f 2

should

should be separated during life. It has been compared to a jointure, to which it bears some resemblance, as being given in consideration of the fortune brought with her; her fortune either proceeded from herself, her mother, or some other person, and was called *dos adventitia*; or from the father or some of the paternal line, in which case it was called *profecititia*: no part of it by law survived to the husband, not even tho' there were children by the marriage, tho' custom seems sometimes to have superceded law in this respect (14). I speak of the course of law where no special settlement or agreement had taken place. The husband's power over her property much resembled that which our law gives him as to a wife's real estate where no settlement. The husband received the profits, but could not alienate it if immoveable (15).

If

(14) At one period if the husband survived, the *dos profecititia* reverted to the father, the *dos adventitia* remained with the husband.

(15) Her lands he could not alienate, not her lands in the provinces, for no claim of *ufucapion* could be set up there, and an express law forbade that title to be set up against her in Italy, against the *fundus dotalis italicus*. With her consent her lands in the provinces might have been alienated, until Justinian having extended

If it c
comme
risable
excepti
good th
jury fro
included
we may
always c
her por
gaged b
some sp
less ano
tled in l
her, bef
lien on
portion,
brances,
became
even du
security,

tended th
the legal
time exte

(16) S

(17) C

II. ch. 4.

If it consisted of moveables, the interests of commerce, and the necessity of disposing of perishable goods, permitted his alienation of it, excepting her *paraphernalia*, but he must make good the value to her, and to prevent any injury from such disposition, that part of his estate included in the *donatio propter nuptias* which we may call his settled estate (and which was always of the same condition and quantity with her portion) could not be alienated or mortgaged by him, even with her consent, unless in some specified cases of extreme necessity, or unless another estate of equal value was to be settled in lieu of it; and as a further protection to her, besides this specifick security she had a general lien on all his property to the amount of her portion, and was preferred to all other incumbrances, even tho' of prior date (16); and if he became impaired in fortune the wife might, even during her marriage, seize her portion or security, or bring an action for it (17).

tended the right of usucapion to the *prædia provincialia*, the legal prohibition of alienation was at the same time extended to provincial estates.

(16) See Code 5. 13. 30.

(17) Compare this with the act of parliament. 5 G. II. ch. 4. Ireland.

But

But tho' the *donatio propter nuptias* was her security, yet she was not put in possession of it. The husband during marriage received the rents, interest, or other profits both of the estate by him settled, and also of her dos or portion, because he was to be at the necessary charges of the marriage state; he was to maintain her tho' she brought no portion (18).

We have observed, that tho' the property of the dos was not transferred to the wife, yet the profits of it, as well as of the *donatio propter nuptias*, were received by the husband during marriage. But all her property need not be contained in the dos, part of it might be kept back, which was then called her *paraphernalia* (19); her goods therefore were *dotalitia* of which the husband had the use and administration, and *paraphernalia*, from *para* and *pherne* over and above her dowry. The *paraphernalia*

(18) Of course he was liable to her debts for necessities. The dos might be given before or after marriage. The father might be forced by the magistrate to give a portion with his daughter according to his estate and ability. See *Pandects*, 23. 2. 19.

(19) Even all she acquired was his, *quodcunque acquirebat*. See *Heineccius Rom. Antiq. lib. 1 tit. 10. sec. 1st.*

included

included
not, as
jewels,
pharnal
without
in her
band fo

(20) C
of parapl
tent of th
confidere
and to w
and above
he cannot
during hi
to his de
the widow
1 P. Wm
77 & 10
Wms. 79
Where
pay his de
els, rings,
given her
2. Atks. 1

included property of different kinds, and were not, as with us, confined to wearing apparel, jewels, and other ornaments, and these paraphernalia she might use and alien at pleasure, without the husband's consent, and bring actions in her own name, or in the name of her husband for the recovery of them (20).

(20) Our law differs considerably both in the meaning of paraphernalia as appears above, and also in the extent of the wife's power over them. They are with us considered as the husband's goods, used by the wife, and to which she becomes entitled at his death, over and above her jointure or dower; the husband, tho' he cannot devise them, may sell or give them away during his life; and tho' after his death they are liable to his debts, if his personal estate is exhausted, yet the widow may recover the value from the heir. See 1 P. Wms 730. 2 Atks. 642. 3 Atks. 394. 2 Atks. 77 & 104. 1 Atks. 440. 1 P. Wms. 729. 2 P. Wms. 79. 544.

Where a husband's personal estate is not sufficient to pay his debts, the wife cannot set up any claim to jewels, rings, pictures, dressing plate, and other trinkets given her before marriage. *Ridout v. Lord Plymouth*, 2 Atks. 104.

Lecture the Tenth.

OF TITLE BY LAST WILL OR TESTAMENT.

THE property left by any person at his death, must either revert to the common stock, or some individual must be pointed out, who has or shall have a right to succeed to it. This right of succession is of two kinds: the first is called legal succession when the property descends in the family according to the order of proximity (1). The second, testamentary succession when that exact order doth not prevail, but the estate of the deceased is transmitted according to his will and pleasure within certain restraints however, and limitations set by the law.

The

(1) As the origin of property, according to Blackstone, is occupancy, it must terminate with the life of the occupant, unless continued in civil society by the legislature. If the legislature did not interfere, the nearest of kin, as being about his person, would naturally become the next occupants.

Lect.

The
testam
is feld
ment,
quires
people
either
the nat

A T
Law, A
post mor
Testam
essentia
former
hares f
raeters
not. (3)

(2) T
wills, as
English
Mr. Gib
the orde
for the c
by Hein
retur, a
more wh

(3) W
dage to a

The legal ordinary succession is the rule, the testamentary the exception (2), and this exception is seldom admitted in the first stages of government, and the first periods of society. It requires some time and reflection to accustom a people to such a power as that of disinheriting, either totally or partially, the heir of blood—the natural heir.

A Testament is thus defined by the Roman Law, *Voluntatis nostræ justa sententia de eo, quod quis post mortem fieri velit*. It was of two kinds—a Testament strictly so called, and a Codicil: the essential difference between which was, that the former appointed a *heres*, commonly called the *heres factus*, (who comprehended our two characters of devisee and executor) the latter did not. (3)

Testaments

(2) Therefore descents should be considered before wills, as I have done in imitation of Blackstone and the English Law, and in conformity with the opinion of Mr. Gibbon, tho' in deviation from the Civil and from the order of Justinian's Institutes. The reason given for the contrary order by the Civil Law, and approved by Heineccius, is, *Quam diu successor a testamento spectetur, ab intestato heredibus locus non datur*; a reason more whimsical than satisfactory.

(3) We use Codicil in a different sense, as an appendage to a last will or testament, and do not attend to

T t

the

Testaments were either solemn or unsolemn (4): The latter were also called Privileged Testaments, and both the one and the other might be either written or nuncupative.

SOLEMN TESTAMENTS]. So unnatural and contrary to all principles did it seem at first to the people of Rome, to disinherit the heir of blood either totally or partially, that in the early ages of their state it could not be done, but by an express law (5). One law, that of descent

the distinction above: Testament (where it is a distinguishing name) meaning with us a will of personal estate.

(4) Our devises of real estate may be compared to the solemn wills of the Romans, on account of the solemnities prescribed by our statutes of Frauds; and our wills of personal estate, (as not requiring the legal precautions of the statute,) to their unsolemn testaments; but a perfect analogy will by no means hold. For instance, devises of land do not appoint an heir, nor create a representation, nor make the devisee stand in the place of devisor, as to all debts, and therefore differ widely from Roman wills.

(5) There was one exception from necessity entitled the mode *in procinctu*. Coriolanus found his army declaring to each other their wills, on the eve of a battle, with their garments tucked up; that is *in procinctu*. Plutarch's Life of Coriolanus.

scient could only be counteracted by another, that of wills; the people was therefore solemnly interrogated in the *Comitia Calata*, whether they chose to ratify a will; if they did, it became legal (6).

With the twelve tables, the power of transmitting property by will began, and they gave to every Paterfamilias this power of willing (7) but prescribed no form.

What then was to be done? The twelve tables had, in this respect, counteracted the first principles of law and the most rooted opi-

T t 2

nions

(6) From hence the principle *Testamenti factionem esse Juris publici*. See Heineccius on the Inst. 161.

(7) So in these countries a right to devise lands was not a common law right, but founded on statutes, as is said in the case of Ansty and Dowling, but in Windham and Chetwind, a case equally well known to every lawyer, Lord Mansfield observing that a power of willing ought to be favoured and naturally follows the right of property, adds, it subsisted in this kingdom before the conquest, and till about the reign of Henry the Second, when it ceased by consequence of Feudal Tenure, not from any express prohibition. The doctrine of uses revived it—the statute of uses again accidentally checked it—this occasioned the statute of wills.

nions, or perhaps prejudices of mankind (8). The lawyers found a medium (9); they considered wills in the same light with alienations *inter vivos*, as our laws do regard wills of real estate, and introduced ceremonies corresponding to this fiction; the will was said to be made per *æs et libram*; it was a fictitious sale, the testator sold the property in the presence, and as it should seem with the approbation of five witnesses present, who represented so many classes of the Roman People.

There was also an *Antistes*, who witnessed their concurrence, and the *Libripendens* who weighed the copper money given for the imaginary purchase by the *Familiæ Emptor*, making the necessary number of persons present, (besides

(8) Yet one would have supposed, from the Roman prepossession for the paternal power that their prejudices would have inclined the contrary way.

Lord Mansfield has observed that the testamentary power over property is more reasonable in these kingdoms than ever it was among the Greeks and Romans, since by reason of primogeniture, and other exclusive rules of descent, the succession *ab intestato* amongst us is not so equal and universal as among those people.

(9) *Inveniendus erat color*, says Heineccius, *quo juris analogia serveratur*.

(besides the parties) seven. The *Familia* Emp-
tor was the devisee or *hæres factus*. He paid
over a piece of money to the officer who held
the balance, to be paid over to the testator (10).

In progress of time the Prætors, (who were
always employed in simplifying and softening
the strict and harsh requisites of the ancient
laws) ratified a more simple form of testament,
without any symbolical sale, or rather they gave
the *bonorum possessionem* according to the testament,
with some similitude to our administration *cum*
testamento annexo.

If then the *hæres factus* could not set up the
testament as agreeable to the ancient forms, he
applied for aid to the Prætorian court (11).

All that the Prætor required was, that seven
witnesses should set their seals to the will :

(10) The Prætorian Testament, says Heineccius, was
improperly so called, because it did not carry with it
the inheritance, but only the *bonorum possessionem*.

(11) Among savage nations, observes Mr. Gibbon,
want of letters is imperfectly supplied by the use of vi-
sible signs, like a pantomime. Rome in its earlier pe-
riods, tho' not in a savage state, was in a very rude one.
Imaginary sale was used among them in alienations,
adoptions, and almost every species of change of pro-
perty.

they

they represented the ancient five witnesses superadded to the Antistes & Libripendens.

At length new Imperial constitutions having been enacted, testaments began to be held valid avowedly as testaments (not as sales or alienations *inter vivos*) tho' made in a manner different from any of the modes above mentioned, if made by persons capable of testation and of things capable of being devised, according to certain rules, and with certain solemnities borrowed from the ancient rites, partly framed out of the Prætorian Edicts, and partly ordained by the Imperial Constitutions (12). From the ancient law was derived the necessity of witnesses—and their presence at one and the same time without interval. The number of these witnesses, and their putting their seals, were circumstances fixed by the Prætorian Edicts, and the Imperial Constitutions required the subscription of the witnesses and of the testator: Justinian himself added the necessity of the testator's heirs name being inserted in the hand-writing of the testator, or at least by the witnesses (13).

external

(12) These if followed rendered all application to the Prætor unnecessary.

(13) *Inst.* 1. lib. 2. tit. 10. sec. 3. & 4.

I shall now proceed to analyse and discuss more particularly these requisites in the form and manner of making testaments, postponing for that purpose at present the consideration of who could make wills—of what they could be made, &c. &c.

FORM AND MANNER OF MAKING
SOLEMN WILLS ACCORDING TO
THE CIVIL LAW.

The solemnities required were either internal or external. The internal was the appointment of an heir which was of the essence of the testament, and without it the will might be a codicil, but could not be a testament (14). The
external

(14) This idea that the naming of an executor is of the essence of a testament, was formerly recognized by the judges of the Common Law, but they have since considered a will in which no executor is named, as effectual to all intents and purposes. Noy. 12.

We may here observe how impossible it is to form any complete analogy between our wills, whether of real or personal estate and the testaments of the Romans. Our devises of real estate, in respect to the solemnities attending their execution may admit a fair comparison with
their

external were signing, attestation, unity of the act.

SIGNING. The subscription of the testator appears to have been necessary from Inst. 2. 10. 3. and from the same authority we collect, that it was first required by the Imperial constitutions. Dr. Harris refers it to a particular constitution of Theodosius, which does not seem to me perfectly to justify his position (15).

If

their solemn testaments, but the appointment of an universal heir, considered as partaking individuality with the testator, subject to all his debts even so as to affect his own property, being no part of the essence of our devises, here appears a manifest and great variation.

Our wills of personal estate on the other hand, while the old opinion prevailed that the appointment of an executor was of their essence, might be compared in that respect to the solemn, and in not requiring certain solemnities to the unsolemn will of the Romans. Even now they cannot altogether be compared to the unsolemn at Rome, for the latter required the appointment of an heir.

(15) See Harris's notes on Justinian's Inst. lib. 2. page 46. the constitution of Theodosius is repeated in the Code, b. 23. 21. it relates to the circumstance of a testator's chusing to conceal the provisions of his will from the witnesses, and declares such secrecy shall not invalidate

Lect.

If

was in

witne

autho

for h

with l

sion b

Th

tho' t

Th

was in

aise,

Inst. 2

tinian

to be

of the

the ha

date it,

in whor

Our law

(15) C

It was a

writing

the wan

mentio

very just

(16) J

signing v

and 2 V

If the testator thro' ignorance or imbecility was incapable of signing the will, an additional witness was called in, whose substituted signature authenticated the instrument, but if the devifor had actually written the body of the will with his own hand, his signature at the conclusion became unnecessary (15).

The testator was not obliged to put his seal tho' the witnesses were (16).

The matter on which the will was written was immaterial, whether *tabulis*, *charta*, *membra-nifve*, on tablets of wax, paper, or parchment, Inst. 2. 10. 12. By a particular provision of Justinian mentioned above, the will was not only to be signed by the testator, but also the name of the devisee or heir appointed must appear in the hand-writing of the testator himself, or of

date it, provided the requisites therein are complied with, in whose enumeration the testator's signature occurs. Our law agrees.

(15) Our law agrees. Lemain and Stanley, 3 Lev. 1. It was at one time very absurdly judged that testator's writing his name in the beginning of the will supplied the want of signature at the bottom, a determination mentioned by Blackstone without disapprobation, but very justly censured by Dr. Christian.

(16) Nor is he by our law, but sealing without signing was held sufficient in Strange 764. 1 Wilfon 313. and 2 Vesey 459. contra.

one of the witnesses (17); and tho' the testator, instead of writing the will himself, might dictate it to another, yet if the writer was the heir or legatary, he was subject to punishment for the deed (18).

ATTESTATION]. I shall next consider the number and capacity of the witnesses required, together with the mode of their attestation prescribed by law.

The number was no less than seven to a solemn will, a number appearing to be determined in its origin by the classes of the Roman people, and by the fictions of the symbolical sale (19).

The

(17) See Inst. 2. 10. 4. Cod 9. t. 23. l. 29. Novels 119. ch. 9.

(18) Code 9. 23. 3. And the passage says, that writers of wills, who had inserted any benefit to themselves, should be subject to the punishments of the Cornelian Law. This was the Cornelian Law *de falsis*, (there was another *de sicariis*) its punishments were death to slaves, to freemen banishment and confiscation of goods.

Notwithstanding this caution, the legatary might be a witness to the will, as we shall see presently.

(19) Every one knows that the statute of frauds requires three witnesses to a will of real estate, and that to a written will of personalty the signature of witnesses, tho' safe and prudent is not indispensably necessary: nor

even

The difficulty which must frequently have occurred in obtaining so great a number of witnesses as seven, might probably induce the Romans to be less strict than we are (as they certainly were) as to the persons whom they admitted upon this occasion. At one time the heir was admitted as a witness, tho' forbidden to be so by Justinian (20), but legataries were always admitted on this distinction, that they were particular not universal successors, *Qui non juris successores sunt*, and that a testament would be valid without legataries, tho' it could not without the appointment of an heir; the objection to the heir as a witness, not proceeding, according to great authorities, from his being interested, but, as is said by Justinian, being a prohibition, *ad imitationem pristini familiæ emp-*

even the signature of the testator, tho' the will be in another man's hand-writing, if proved to be according to his instructions, and approved by him. See 2 Bl. Com. 501. Two witnesses to a will—two to a codicil reciting that will, one of which last was also a witness to the will—It does not satisfy the statute. 3 Salk. 395.

(20) See 1 Burr. 426. The essence of the Roman Testament was the appointment of an heir to represent the testator, not according to our ideas of representation, but in the mode already sufficiently explained in the chapter of descent.

toris; quia hoc totum negotium testamenti ordinandi gratia creditur hodie inter testatorem & heredem agi (21): In short the heir was a party to the supposed contract, and therefore could not be a witness: the legataries were not.

The witnesses must have been freemen, Roman citizens, adults, or at least of the age of fourteen years, *testabiles*, i. e. *Quibuscum erat testamenti factio*; and not members of the family of either heir or testator. The three first of these requisites require no new explanation: but the fourth, as expressed by the Roman Law, may be misapprehended. The phrase *quibuscum erat testamenti factio* did not mean who could make testaments, (for a woman could make a testament) but who could be present at the Comitia Calata, where testaments were originally made; this in itself excluded slaves, minors, those deaf, dumb and blind, prodigals and infamous persons; to which are added the insane, if insanity could require any exclusion but that created by common sense.

Of freedom from these incapacities, and of the witnesses being in situations which rendered them competent, general reputation was sufficient evidence. Thus, if a reputed freeman,

(21) *Inst. lib. 2. tit. 10.* See 1 Burr. p. 426.

but real slave, happened to be a witness, the will was not thereby invalidated. 2 Inst. 10. 7.

All the branches of the families of heir and testator were excluded, upon principles connected with the fictitious sale, viz. because they were supposed to be parties to the contract, and although the symbolical mode became obsolete, the rule was retained (22). All persons in testator's power, or among his domestics, excluded. 2 In. 10. 9.

Having thus mentioned five requisites to the competency of a witness to the Roman Testament (23), the reader might naturally expect some

(22) *Ad imitationem pristinae emptionis.*

(23) I hope the student will not think me departing too much from my subject matter, or performing an idle task in abridging here the famous controversy between Lord Mansfield and Lord Camden on the competency and credibility of witnesses to a will, the substance of which it generally gives some trouble to young men to collect.

Witnesses were not especially necessary to a will of real estate, before the statute of frauds; that statute required the subscription of three *credible* witnesses. The word *credible* was an unfortunate word, and has occasioned much dispute, which the use of the word *competent* might possibly have prevented.

Hence, in the case of Ansty and Dowling, Strange, 1254, the question arose whether the witnesses to a will answered

some discussion of objections arising to their competency or credibility from their being interested

answered the description in the statute. The case was this, James Thompson made his will of real estate, attested by three witnesses, and gave to one John Hailes and his wife 10*l.* each for mourning, and an annuity of 20*l.* to Elizabeth, the wife of John. John Hailes was one of the witnesses to the will, and refused to be paid 20*l.* in lieu of his wife's legacy and his own: it was determined that the witnesses to a will should not be persons who are entitled to any benefit under that will, and that John Hailes was not a good witness.

This case gave rise to the statute 25 Geo. II. ch. 6. in England, and ch. 11. in this kingdom, which declare all *legacies* given to witnesses to be void, and thereby remove all possibility of interest affecting the testimony of legatees named, and directed the testimony of all *creditors* to be admitted, leaving their credit to be weighed by the court and the Jury.

How the case of Windham and Chetwind, which was that of simple contract creditors witnessing a will which charged the real estate with payment of debts, could occur after this statute, does not at first sight appear; but I suppose it was under the exception in the act relative to suits already instituted, the proceedings in that case appearing to have been commenced in August, 1750, and the retrospect of the act being only to June, 1752.

In

terested; but here, in the opinion of no less a judge than Lord Mansfield, all enquiry is useless,

In that case, in which the witnesses had been paid off, before the trial, and which is reported in 1 Burr. 414, Lord Mansfield is of opinion, that the word *credible* in the statute is either superfluous or absurd; if it means competent, superfluous; if it means something more than competent, absurd, because it would make the validity of a will depend on the credibility of the witnesses, which would be absurd, since the testator never could foresee what credit might hereafter be given to them. As therefore competency only was required, he was also of opinion that such competency might be acquired subsequently to the attestation, as by payment, release, &c. &c.

In the case of Hindon and Kersey, 5 G. III. 1765, (which was the case of a devise towards the support of the poor in a certain township, to which two persons liable to be assessed to the poor tax in said township were witnesses, and which case was not cured by the act 25 G. III.) Lord Camden held that the word *credible* in the statute exactly means competent, and that to give it another meaning, viz. that of credibility in the ordinary sense of the word would be absurd. So far he agrees with Lord Mansfield, but as to its being a superfluous word he differs widely, and the tenor of his argument is, that it was inserted to mark that this competency

less, since he has decidedly laid down this position, that tho' in other cases the objection of interest

petency must exist at the time of the attestation, and cannot be acquired by any subsequent act, such as a release, and that the contrary doctrine held by Lord Mansfield in Wyndham and Chetwynd, originated in his considering this word as superfluous, or having no legal meaning.

Lord Camden held, that the word *credible*, in the statute of frauds, meant competent. Lord Mansfield, that if it did not mean that, it meant nothing, so far they agreed; but herein they differed, that Lord Mansfield said it was a superfluous word (its meaning being included in the word witness) and also that witnesses, tho' incompetent at the time of the attestation, yet if they became competent afterwards, were good witnesses to the will. Lord Camden held, that they must be competent at the time of the attestation, and that to mark this very thing, the word *credible*, as an emphatic word, was inserted.

Want of attention to the plain truth uttered by Lord Mansfield in Wyndham and Chetwynd (that to make the validity of a will depend upon the credibility of witnesses, which the testator cannot foresee, is absurd) produced in the remarkable cause of Newburgh and Burroughs (tried in Ireland about ten years since) this notable argument. A witness to the will then in question swore on the trial to alterations made without the testator's

Lect. 2

interest
incapacI hav
and mthink I
surely is
usual w
shew a
fions.L. C.
in his a
graph fr
testium
mortis t
terest wa
time of
any sub
shewn,testator's
believed h
did not be
the will th
nesses, a
the bye-ft
Yet I hav
very celeb

interest to a witness was allowed, yet it did not incapacitate witnesses to a will by the Civil Law.

I have not courage to oppose that very great and most learned judge upon the point, tho' I think I see authorities to the contrary, and it surely is an exception very inconsistent with the usual wisdom of the Civil Law, which appears to shew a laudable jealousy upon all similar occasions.

L. C. J. Lee was of that opinion tho' mistaken in his authorities. Quoting the following paragraph from Dig. lib. 28. tit. 1. c. 22. (*conditionem testium tunc inspicere debemus, cum signarent, non mortis tempore*;) he argued from thence, *that interest was an objection*, which if existing at the time of subscribing, could not be taken off by any subsequent fact; but Lord Mansfield has shewn, that *conditio testium* means the positive

testator's knowledge. It was insisted that if the jury believed him, it was not the testator's will, and if they did not believe him he was not a credible witness, and the will therefore void for want of three credible witnesses, a mode of reasoning so comical, that none but the bye-standers could have thought the framer serious. Yet I have since known jurymen of great ability, in a very celebrated cause, caught in the same trap.

capacity of the witnesses, their rank or quality, their condition of citizenship, freedom and puberty (24).

MODE OF ATTESTATION.]—I shall begin by taking notice of two regulations peculiar to the Civil Law, the one, that the witnesses should be specially required by the testator to witness the will; the other, that the whole perfection of the will should be done *uno contextu*.

The first rule requires no explanation, and is a circumstance which amongst us also must always be of weight, as shewing more particularly the solemn, deliberate intention of the testator, but which is not of indispensable necessity (25). The latter rule means that no foreign act should intervene, and this principle of *uno con-*

(24) If there was no other instance to prove the great utility, even in our common law courts of a superior knowledge of the Civil Law, and of its technical Latin, this mistake of Ch. J. Lee, and its correction by Lord Mansfield would be conspicuous.

(25) The stupid silence of the testator, while another in his presence required the witnesses to attest, might be a strong ground of suspicion; but mere silence, where sanity undoubted, would be construed simple acquiescence.

textu

Lect.

textu

quent

tion fr

tiring

until

dental

absenc

fore th

the wil

The

should

should

see him

lish the

at the f

the figh

355. W

(26)

terminated

real estat

menting

serve, tha

presence

knowledg

times, an

appears fr

N. B.

textu was carried ſo far, that wills were frequently ſet aſide for the moſt immaterial variation from it; for inſtance, for the teſtator's retiring from the room for the ſhorteſt interval, until Juſtinian provided, that ſuch ſhort accidental intervals occaſioned by the momentary abſence of him, or of one of the witneſſes, before the act compleated, ſhould not invalidate the will. C. 6. 23. 27.

The next requiſite was, that the witneſſes ſhould be all aſſembled together, and that they ſhould ſubſcribe in the ſight of the teſtator, and ſee him ſign, and hear him acknowledge and publiſh the ſame: and all the witneſſes ought to ſign at the ſame time, and in the ſame place, and in the ſight of each other. Code 6. 23. 28. Ayliffe 355. Wood 124. Halifax 34. (26),

The

(26) The vaſt variety of caſes which have been determined in our courts upon theſe points, as to wills of real eſtate, it does not come within my province as commenting upon Civil Law, to delineate. Suffice it to obſerve, that the witneſſes muſt, by the ſtatute, ſign in the preſence of the teſtator, and muſt ſee him ſign or acknowledge his ſigning, but this they may do it at different times, and therefore need not ſee each other ſign, as appears from the caſe of Jones and Lake, 2 Atkyns 176.

N. B. When I have ſaid that by the ſtatute of frauds

The last requisite was sealing, a mode of authentication which seems to have anteceded the custom of signing, and was, as Sir W. Blackstone has observed, in the Civil Law the evidence of truth, and required on the part of the witnesses at least, at the attestation of every testament

the testator must sign in the presence of the witnesses, I speak according to what has been generally understood to be its meaning, for Mr. Douglas truly observes, that this most carelessly penned statute does not say he shall do so, tho' it obliges the witnesses to subscribe in his presence, and *e contra*, when regulating revocations of wills, it omits to direct the subscription of witnesses in his presence, but expressly prescribes his signing in theirs. The statute is said to have been injudiciously put together from some loose notes of Lord Hale after his decease, and not by himself as vulgarly imagined.

Query, May not however the direction to sign in their presence have been purposely omitted, to enable him to acknowledge a previous signature? Three signings, one in the presence of each witness will not do. 1 Vesey, jun. 16.

The witnesses to a will says Lord Mansfield, 1 Burr. 421. need not know the contents, need not be together, need not see the testator sign it, it is sufficient if he acknowledges his signature, he may deliver it as a deed. The last position determines that publication of it as his will is not necessary; a point much disputed in Wallis and Wallis, and Trimmer and Jackson, in the beginning

testament (27), but it was not necessary that the seals should be their own, except in the case of a notary. Nov. 73. ch. 5 and 6.

SOLEMN NUNCUPATIVE WILLS.]—

What I have hitherto said hath related to solemn written wills, but there is no material difference in solemn nuncupative ones, in respect of the solemnities except what necessarily arose from their not being written; that is, as they were not necessarily at any time to be reduced to writing (28), subscription and sealing of course did

ning of the present reign. But to enable any one of the witnesses singly to prove the will, he must be able to shew that the others signed in testator's presence, and therefore must have seen them sign himself. See Longford and Eyre. 1 P. Wms. 174.

(27) See 2 Black. Com. p. 305. where the learned commentator observes on the antiquity of this solemnity, among the Persians and Jews, &c. &c.

It is observable tho' among us sealing from the Norman æra was always required to a deed, yet signing was not, until the statute of frauds. *ibid.*

(28) With us, Nuncupative wills must be reduced to writing within six days after the making; otherwise after the expiration of six months no testimony can be received to prove them: and if the estate bequeathed exceed

did not apply to them : but seven witnesses were required, able to give clear and undoubted testimony of their having been present, and having heard the testator declare his will and nominate his heirs.

Before I dismiss the subject of solemnities, I cannot omit to insert the judgment of Lord Mansfield upon their validity in general. He held, that courts of justice ought rather to lean against than in support of these rigid formalities; and declared his opinion in the above-mentioned cause of Wyndham and Chetwynd, that more fair wills had been destroyed for want of observing the restrictions fixed by the statute of

exceed 30l. there must be three witnesses, requested by the testator to witness the same, and it must be in his last sickness, and in his dwelling-house, or at least where he has been resident ten days before the making, except he were taken sick while from home, and died before his return *, otherwise the will is invalid. By way of further caution, probate cannot be granted of any Nuncupative Will till fourteen days after testator's decease, nor without citing either the widow or next of kin. 7 Will. III. ch. 12. in Ireland; 29 Charles II. ch. 3. in England.

(*) I take the words of the statute, but surely a man *dying before his return* is a legislative blunder, and Mr. B. very probably says, dies *without* returning.

frauds

Lect.

frauds

cautio

the C

frauds

To th

doubt

since

But w

been p

to pre

it alwa

is to b

dicate

were t

and en

UN

The st

scribe

merous

father

and al

will ac

his pre

the ru

the ha

contagi

ledged :

frauds, than fraudulent wills obstructed by its caution: adding, that in all his experience at the Court of Delegates, he had never known a fraudulent will, which was not legally attested. To this Lord Camden answers, that he has no doubt many fraudulent wills have been made since the statute, and all formally executed. But who can tell me, says he, how many have been prevented. The design of the statute was to prevent wills that ought not to be made, and it always operates silently by intestacy. If a law is to be slighted because it doth not entirely eradicate mischief, no law can escape censure. Such were the opposite sentiments of these two great and eminent judges.

UNSOLEMN PRIVILEGED WILLS.]—

The strictness which we have just ceased to describe was dispensed with by the Romans in numerous cases. The officious testament of a father bestowing his property on his children, and all in his own hand-writing; the dignified will acknowledged before the prince, honored by his presence, and receiving his Imperial sanction; the rude bequest of the ignorant rustic; and the hasty testament of the victim to general contagion; might be unsolemn, and were privileged and exempt from the necessity of the usual formalities

formalities (29). In some of these cases five witnesses were sufficient, in others more were required; the literate might subscribe for the unlearned, and the cotemperate presence of the whole number was dispensed with: but above all, the military testament of the gallant but unlettered and endangered (30) soldier, claimed peculiar immunities for honorable service and perilous exertion; he might write it in his blood upon his shield, or inscribe it in the dust with his sword (31); he might dictate it to his comrades in the hour of danger, and depend upon the survivor to transmit it to his country. No certain number of witnesses, nor even any formal witness whatsoever were required to his testament, if his intention could be proved to have been expressed either by word or writing; no special requisition to the witnesses, no subscription or sealing on their part, no specific positive quality in them (for even women and aliens,

(29) See for all these, the sixth book of the Code, tit. 23.

(30) The statute of Frauds excepts from its regulations respecting wills, whether written or nuncupative, soldiers in actual and military service, and mariners or seamen being at sea.

(31) Code, b. 21. 15.

could

Lect.

could
mand
confir
matte
die pa
under
proper
die wi
not be
passed
but th
tached
actual
the te
cessity
one ye
his dep
tended
by dep
was th
to the

(32)
of the f
in part.
(33)
pounded
accordin

could be witnesses to the soldiers will) were demanded by the law. Nor were his privileges confined to the manner of the testament; in the matter he had special exemptions. He might die partly testate, partly intestate (32): tho' still under paternal power, he might dispose by will of property acquired by military service. he might die with more wills than one: his will could not be inofficious, i. e. his children might be passed by, without express exclusion by name: but these honourable distinctions were not attached to the name of soldier; he must be in actual service and in present danger, and tho' the testament thus hastily made and from necessity, was valid even if he was disbanded, for one year next following such his dismissal; yet his departure from the army must have been attended with honor, and disgrace was followed by deprivation of privilege. Such and so great was the attention paid by this military nation to the protectors of the state abroad (33).

CODICILS.]

(32) He was not subject, says Wood, to the subtilty of the fiction that the testator could not be represented in part.

(33) The Canonists, says L. Ch. J. Gilbert, have expounded wills of personalty like the *testamenta militaria* according to the intent. Treatise of Equity. 2 vol. p.

CODICILS.]—A Codicil (34) in the Roman Law meant not, as with us, an appendage to the will; it meant a last will standing by itself, and not annexed to any thing preceding, yet not acknowledged to be a testament *for want of the appointment of an heir*; it was therefore defined an unsolemn last will, in which no heir or executor is named, and might be either written or nuncupative. The maker of a codicil, or codicils, (for he might make more than one) might die either testate or intestate. In the first case, that is if he had also made a testament, it did not affect the codicil: that remained valid, even tho' it preceded the testament and was not confirmed or mentioned by it, provided it was not actually revoked or contradicted thereby; in the latter the codicil was a direction to the heir by descent, who acted like an *administrator cum testamento annexo*.

329. on which Mr. Fonbl. remarks, it might be inferred from hence, that the *testamentum militare* was the only will which by the Civil Law was construed according to the intent, which is not true, for tho' the *testamentum militare* was one of the privileged descriptions of wills, its privileges were merely dispensations with certain solemnities essential to the validity of other wills.

(34) Upon this subject consult Inst. lib. 2. tit. 25.

The

The
no fol
no ext
requir
other c
be acc
and th

Tho
tuted c
testam
trustee
inherit
before
not of
essentia
away t
would
ancesto
particu

In th
Institu
gin of
a journ
seven v
was th

The Inst. 25. 3. says, that codicils required no solemnity. They must mean, says Harris, no *extraordinary* solemnity, for five witnesses were required, the number necessary upon several other occasions (35), but the five witnesses might be accidentally present and not required thereto, and they might even be of the female sex.

Tho' in a codicil an heir could not be instituted directly, yet an heir already instituted by testament, might by codicil be declared a bare trustee; but testamentary heirs could not be disinherited by codicil, nor made conditional if before absolute, and a plurality of codicils tho' not of testaments was allowed, because it was essential to a testament that it should convey away the whole inheritance, otherwise the heir would not stand completely in the place of the ancestor, whereas codicils only convey several particular legacies.

In the 25th chapter of the second book of the Institutes, a curious account is given of the origin of codicils, occasioned by the difficulty on a journey, a voyage, or an embassy, of finding seven witnesses all Roman citizens. Their æra was that of Augustus—their introducer Lucius

(35) Code, b. 36. c. 8. and 4. t. 20. c. 18.

Lentulus, and the Emperor consulted the learned Trebatius (36) upon their validity.

Having now done with the different kinds of testaments, and the form and manner of making them, I shall treat of the remainder of the subject under the following heads.

I. WHO COULD MAKE WILLS.

II. OF WHAT THEY COULD BE MADE.

III. OF THE INSTITUTION OF THE HEIR, HIS RIGHTS AND DUTIES.

IV. OF THE QUASI HÆRES OR EXECUTOR.

V. OF THE INTERPRETATION OF WILLS, AND CONSTRUCTION OF LEGACIES.

VI. HOW WILLS MIGHT BE AVOIDED.

VII. OF PROVING THE WILL.

VIII. OF THE BONORUM POSSESSIO AND ADMINISTRATION.

IX. OF THE COLLATIO BONORUM.

(36) *Docte Trebati*. Hor. If we might judge from this caution and attention to the laws in Octavius Cæsar, we should not be inclined to join in the severe censure passed on him by Sir W. Jones, who says, “when that
“base dissembler and cool-blooded assassin C. Octavius
“gave law to millions of honefter, wiser and braver men
“than himself, by the help of a profligate army, and an
“abandoned senate.”

First

Lect.

First
MAK

full P
that
law ;

nors,
insane
dical,

but th
of the

qualifi
nal po

we mu
den, w

specific
with h
nounce
written
knowle

The
not par
privatio
ted in t
minal
such as

(37)

First, WHO COULD OR COULD NOT MAKE A TESTAMENT.] Every person had full power and (37) liberty to make a will that was not under some special prohibition by law; the persons prohibited were however, minors, persons under the paternal power, the insane, the deaf and dumb, the blind, the prodigal, the prisoner of war, aliens and criminals; but these prohibitions must with respect to some of them, be a little qualified. We have already qualified the restriction on the son under paternal power, by an exception for military service; we must add, that the prodigal was only forbidden, while his conduct retained him under the specific interdiction of the law from meddling with his property, and the blind, might pronounce a nuncupative will, and even dictate a written one, if afterwards read to him and acknowledged by him before witnesses.

The deaf and dumb must be completely and not partially so, and must have suffered these deprivations from their birth; the alien was permitted in the later times of the empire, and the criminal must have been guilty of capital crimes, such as treason, murder, or some other grie-

(37) See 2 Inst. title 12.

vous offences, such as suicide, heresy, manifest usury, and libelling, which the Civil Law ranks among the most abhorred enormities (38).

The case of the prisoner of war was peculiar; if his will was made during his captivity it was invalid, notwithstanding his future liberation; but if executed antecedently to his imprisonment it was set up by the *jus postliminii* if he returned, by the *Cornelian law* if he died a captive.

As to the case of the minor under puberty, I have only to observe, that his testament did not become valid, tho' he arrived at puberty before his death (39).

The

(38) The horror with which the Roman Law considers libelling, and the severity with which it was punished is very remarkable. If the libel charged a crime punishable with death, the author himself was capitally punished; if it affected only reputation and not life, the composer of it was incapacitated to give testimony or to make a will; and originally by the Twelve Tables, all libels were punished with death.

(39) Nor does it with us as to lands if he dies, without republication of it before 21, 1 Siderfin 162. T. Raymond 84. The same is the law as to personal estate; for the rules of the Civil Law hold with us, as to the capacity or incapacity of minors to make wills of personal estate.

The rule of the Civil Law, with respect to insanity in the testator must agree with ours, because both agree with common sense. Subsequent insanity did not validate a will made while in whole mind, nor return to reason that declared during the furor: a will made in a lucid interval was to be established (40), and the extraordinary maxim of our law, that a man shall not himself do away an act performed during his insanity, i. e. shall not stultify himself, is peculiar to our institutions.

The restriction on the prodigal so novel to our feelings, must have caught the attention of every reader, and its non application under our constitution, has been well accounted for by a learned commentator often quoted, whose observations thereon will be found in the note beneath (41). It must be noted, that the interdiction of the administration

estate. So that boys under the age of fourteen, or girls not arrived at twelve, cannot make wills of personal estate.

(40) If a lucid interval be alledged, the burthen of proof attaches on the party alledging it; if derangement be alledged, it is clearly incumbent on the party alledging it to prove such derangement. See Fonb. vol. 1. p. 66.

(41) The law of England, whilst it anxiously protects the interest of those whom the infirmities of disease

administration of his goods did not affect a will made previous thereto.

The student will also observe, that tho' women were prohibited from witnessing wills, they were suffered, whether married or single to make

ease or imbecility of age, render incapable of protecting themselves, respects the right which every individual of a free constitution claims, and which indeed, the very nature of a free constitution seems to require, that of disposing of his property as he thinks fit, provided he in so doing consults the rights and claims of others; the only restriction prescribed by the law of England in such case being, "*Sic utere tuo ut alienum non lædas.*" The Civil Law, however, extended its views and protection to persons whose prodigality might not only prejudice their own interests, but those of their offspring, and we find the authority of the Prætor frequently interposed, to restrain the extravagance of the individual, "*Solent præterea si talem hominem invenerint qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profundit, curatorem ei dare exemplo furiosi; et tamdiu erunt ambo in curatione quamdiu vel furiosus sanitatem vel ille bonos mores receperit. Ff. 27. 10. 1. furiosi vel ejus cui bonis interdictum sit nulla voluntas est.*" Digest lib. 50. tit. 17. reg. 40. Fonb. Treatise of Equity, vol. 1. p. 41.

them

Lect.

them (of power of son usufruct one, first privilege inabilit of the where t

II. W NOT various markab church, dus dota those th such as

Proper of the universal

(42) W making a with the h her for her auter droit, tenance; l make an a a testamen nistration,

them (42), which seems to shew that their want of power to attend the Comitia Calata, the reason usually given for the former is not the true one, since it would equally extend to the latter privilege. Perhaps the true reason for their inability to attest, was the supposed imbecility of the sex, which prevented their being called where the choice of witnesses was voluntary.

II. WHAT THINGS COULD OR COULD NOT PASS BY WILL.]—I have already in various places mentioned some of the most remarkable of these, such as the goods of the church, the property of corporations, the *fundus dotalis* and *paraphernalia* of the wife, and those things which were not *in commercio*, e. g. such as are called public.

Property acquired subsequently to the making of the will passed by it; if the bequest was universal, of all the property, or the thing be-

(42) With us a married woman is utterly incapable of making a will of lands, or even of chattels, excepting with the husband's consent, unless they have been given to her for her sole and separate use, or are in her possession *in auter droit*, or are the savings out of a separate maintenance; but with the assent of her husband she may make an appointment as to personalty, in the nature of a testament, which shall repel the husband from administration, and give it to her appointee.

queathed universal, as a *whole* flock of sheep, or a herd of cattle (43), but in particular legacies the date of the testament and not the time of the death was to be regarded. See Swinburne, part 7. sec. 11. and Treatise of Equity, book 4. part 1. c. 1. f. 13.

It was an extraordinary provision of the Roman Law which enabled the testator to bequeath a thing not his own, the meaning of which was, that his heir was obliged to purchase and deliver it, or to render the value of it, if it could not be purchased, but if the thing was incapable of alienation, the bequest was void. And even if the legatee had purchased such bequeathed property of another, he might recover the value *ex testamento* (44).

A man might also bequeath things which did not exist, provided there was a possibility of their existence, as the fruits which should grow

(43) Inst. lib. 2. tit. 20. sec. 18 & 19. Our law agrees as to personal estate, but differs as to real, from the principle that a devise of real estate is considered as a conveyance declaring the uses to which the land shall be subject, and therefore without republication, after purchased estate does not pass. Salk. 238.

(44) 2 Inst. 20. 4. Swinburne will have our law to be the same. Swin. 188.

on a particular spot of ground, or the offspring which should be born of a particular slave (45).

If a man bequeathed a thing which he had pledged to a creditor, the heir was under a necessity of redeeming it (46).

Upon the whole, then, all things were capable of being bequeathed that were *in rerum natura* existing, or which might so exist, whether corporeal or incorporeal, moveable or immoveable, the testator's own, or belonging to the heir, or to another person, provided they were such things as lay in commerce, and might be purchased.

III. OF THE INSTITUTION OF THE HEIR, HIS RIGHTS AND DUTIES.]—

I must here recall the attention and recollection of the reader to the signification of the Roman heirship as formerly explained in the chapter

(45) 2 Inst. 20. 7. So with us, according to Swinburne, p. 18. If a man bequeathes trees or grafs growing on an estate of which he was seized in right of his wife, his bequest will not pass, because he cannot bequeath the trees which are parcel of the freehold and descend with the land to the heir; but he may bequeath the corn growing thereon, because that is parcel of his own goods.

(46) 2 Inst. 20. 5. One that hath money to be paid to him on a mortgage, may demise this money when it comes. Godol. O. L. 391.

of descent and request him to apply whatever was there said of the natural heir or heir by descent, to the instituted heir also, or heir by will. The heir was by fiction of law supposed to be the same person with the deceased; and all rights, duties, and actions which were vested in the testator, or to which he was liable, immediately affected the heir, not only as far as he had effects by descent, or property by devise, but as far as he had any substance in the world of his own, as well as accruing to him from the testator.

The consequence of what has been said was, that no man would hastily take upon him the heirship till he had well considered whether the estate was or was not more than sufficient to pay the ancestor's or testator's debts, and whether he should gain or lose by the undertaking. The persons instituted heirs might be the children of the deceased, called *sui hæredes* & *necessarii*, natural and necessary heirs; or his bondmen, called *necessary* only; or strangers and volunteers: The bondman could not refuse, and in return obtained his freedom of course.—The child by the laws of the Twelve Tables could not refuse (47), but was afterwards indulged, if he had

(47) *Sui quidem hæredes ideo appellantur, quia domestici hæredes sunt, & vivo quoque patre quodammodo domini existimantur*

had no
even if
strange

The
was thi
tain or
to take
did so
cens, b
conven
the will

timantur
velint, si
lege 12 t
volentibus
rum bona
tit. 19. f.

(48)
potestas f
Dig. 29.
Executor

(49) B
this subj
the Pande
tle of th
hæreditate

(50) A
or renour

had not intermeddled with the effects (48), or even if he had, provided he was a minor; the stranger of course had his free option.

The method of proceeding then in later times was this (49): The law did not appoint any certain or definite time within which the heir was to take the heirship on himself, and until he did so the inheritance was called, *hereditas jacens*, but the creditors of the deceased might convene him to declare, whether he would prove the will (50) and take the heirship on himself

timantur. Necessarii vero ideo dicuntur quia omnino, sive velint, sive nolint, tam ab intestato, quam ex testamento, ex lege 12 tabularum heredes fiunt, sed his Prætor permittit volentibus abstinere hereditate, ut potius parentis quam ipsorum bona similiter a creditoribus possideantur. Inst. lib. 2. tit. 19. sec. 2.

(48) *Impuberibus liberis omnimodo abstinere ab hereditate potestas fit; puberibus autem ita, si se non immiscuerint. Dig. 29. tit. 2. 11.* a rule similar to that affecting our Executor de son tort.

(49) Besides the Institutes, the student should read on this subject the whole fifth title of the 28th book of the Pandects, *de hereditibus instituendis*, and the second title of the 29th of the same, *de acquirenda vel omittenda hereditate*.

(50) As he may with us cite the Executor to prove or renounce.

or

or not ; being thus called upon to determine, a stated time was given him, at least one hundred days, to deliberate and examine the circumstances of the deceased, which privilege was called the *jus deliberandi* (51).

The situation of the instituted heir still continued however to be extremely embarrassing and perplexing : he was obliged either to accept the inheritance simply, or renounce it altogether. He might be mistaken in the circumstances of the deceased, and the mistake might end in his ruin. Justinian was the first who cured these defects, and reduced matters to a footing of common sense : he allowed the heir to make an inventory, and return it to a public officer, containing a full, true and perfect account of the testator's goods, upon doing which he was answerable as far as the contents of the inventory, but no further.

The heir might accept the heirship either by express words, which was called *aditio hereditatis*, or by intermeddling, *vendendo prædia colendo, locandove*, when he was said *pro hærede*

(51) *Reſtor Provinciæ aditus ſi hereditate necdum ſunt obligati, eos an hæredes ſint interrogare debet ; ſi tempus ad deliberandum petierint, moderatum ſtatuet. Code. b. 30. 9.*

ſe

Lect.

ſe ge
the h
it (53)
Code.

tance,

heir (5)

The

perſon

ception

want o

apoſtat

were i

exclud

(52)

(53)

fices for

courts a

prove ; h

ing of j

practice

allow it.

Lord Pe

muſt be

to anothe

and adm

251.

(54) S

alſo reſid

executor,

Swinburn

se gerere (52). If the heir refused to accept the heirship he could not afterwards claim it (53), at least not after a certain period elapsed. Code. b. 31. 6. and, if he died before acceptance, the right was not transmitted to his heir (54).

The delicacy of the Civil Law in admitting persons to the heirship, produced numerous exceptions to the acquisition of this right; for want of citizenship, aliens; for defect of probity, apostates, heretics, traitors, libellers, convicts; were incapable of being heirs: women were excluded by the Voconian Law, but I do not

(52) 2 Inst. 19. 6.

(53) With us if one executor proves the will it suffices for all, and any other executor in the Common Law courts after renouncing is still allowed to come in and prove; by the Civil Law he is not: but to prevent a clashing of jurisdictions the Ecclesiastical Courts in modern practice in Ireland, and I suppose in England, generally allow it. See the famous case of *Downs and House v. Lord Petre*. Salk. 311. therefore a surviving executor must be cited again before administration can be granted to another, but *secus* if all the executors refuse *at first*, and administration has been granted. See 3 P. Wms. 251.

(54) So if Executor die before probate, unless he be also residuary legatee, his right is not transmitted to his executor, but administration granted to next of kin. Swinburne, p. 396 and 477.

find

find infants among the prohibited (55). The adultress could not be heiress in the testament of the adulterer, nor e contra; restraints were laid on the testament of second nuptials (56): corporations were excluded, except latterly thro' the intervention of trustees, and as it was customary, in order to maintain a bad title, to institute the emperors themselves, those princes, with Pertinax at their head, have in various parts of the Civil Law nobly disdained such insidious bounty, and Severus and Antoninus exclaim, *licet legibus soluti simus tamen legibus vivimus*, with an honest liberality in the conclusion of the adage, which may heal the stigma often thrown upon the Civil Law by its assertion in the commencement (57).

If there was no objection to the capacity of the persons, the testator might appoint as many heirs as he pleased, in equal or unequal portions, all of whom made but one person, and

(55) The second husband could not take by bequest a greater portion than one of the children of the first marriage.

(56) The gods could not be made heirs, lest the priests should share. Ulpian Fragm. 25. 6. Heineccius Antiq. lib. 2. tit. 14.

(57) With us infants may be executors, but an administrator must be appointed during minority.

were

Lect.
were
They
A S.
metal
afterw
integr
capabl
when
be unc
out a
tion is
when t
or twel
dered a
If an
dispos
(58) T
will thre
i. e. he
and Q.
fourth b
the uncia
her heir
and one-
Ebutius
money,
33l. 7s. 8
of Civil I

were said to be heirs of certain parts of the *AS*. They collectively represented the testator. The *AS*, which originally implied a pound weight of metal, and was at first only applied to money, was afterwards made by the Romans to denote an integral, or whatever consisted of parts or was capable of subdivision, so that *heres ex asse*, when applied to estates and inheritances must be understood of the man who sweeps all without a distribution, and this way of computation is constantly followed by the Roman writers when they consider inheritances, and the uncia, or twelfth part of the *AS*, was itself also considered as an integral, and subdivided (58).

If any parts were wanting, or remained undisposed of, so much was deducted or added

(58) Thus Julius Cæsar is said to have left by his last will three heirs: C. Octavius was his heir *ex dodrante*, i. e. he had three fourths of the *AS*. and L. Pinarius and Q. Pedius had the remaining quadrans, or one-fourth between them. The sextula was one-sixth of the uncia. Cicero mentions a woman who left Cœcina her heir *ex deunce et semuncia*, i. e. of eleven uncia and one-half; to Fulcinus she gave two sextulæ, to Cebutius one; so that if she died worth 1200l. of our money, the first would have had 115l. the second 33l. 7s. 8d. the third 16l. 13s. 4d. Taylor's Elements of Civil Law.

to every heir; and if one was nominated heir of part only, the whole devolved or accrued to him, if no heir was instituted as to the rest, for none but a soldier could die testate and intestate; and the heirs thus taking were not answerable one for the other to creditors, but each in proportion to his own portion or share.

It was a very extraordinary provision of the Roman Law, which suffered a person expressly instituted heir, to be set aside, after the death of the testator, for unworthiness; not that it can be supposed that his demerits were to be ascertained by common report, or subject to the tribunal of private scandal. The instances were ascertained by the law, and must be proved in a court of justice, and thought by the judges sufficient in degree to justify the deprivation. Such were occasioning the testator's death, or not prosecuting the authors of it if of a violent kind, attempts to defame his honor and reputation, or other base ingratitude (59).

The institution of the heir might be absolute or conditional; an impossible condition was

(59) Do we not see in daily practice instances of ingratitude, and forgetfulness of the wishes of testators, which would make us almost wish this was the law of these countries?

considered

confide
ly requ
were in
any (60
from a

The
he had
pences,
making
satisfy
creditor
be calle
testator

(60) I

(61) B
be appoin
administra

(62) C

(63) N
funeral ex
and the lib
nistrator is
of equal d
come first,
of record-
by simple

considered as null ; if many conditions were jointly required, all must be complied with ; if they were in the disjunctive, it was sufficient to obey any (60). But the heir could not be instituted from a certain time, or to a certain time (61).

The heir was allowed to pay himself the sums he had expended as heir, such as funeral expences, the charge of registering the will, or making the inventory ; he was at liberty also to satisfy his own debt in preference and to pay the creditor that came first (62) ; but he could not be called on to pay debts till nine days after testator's death (63).

The

(60) Inst. lib. 2. tit. 14. sec. 9. 10. 11.

(61) But with us an executor who is quasi hæres may be appointed either *from* or *until* a certain time, and administration granted in the mean time.

(62) Code, b. 30. 22.—45 and 9.

(63) Nov. 115. ch. 5. Our law agrees as to paying funeral expences, and the expence of proving the will, and the like in the first place. The executor or administrator is also allowed to pay himself first among debts of equal degree. In paying creditors the king's debts come first, then debts preferred by statute—then debts of record—next debts by special contract—lastly debts by simple contract. The order of the Civil Law is very

The Civil Law may justly boast a superiority to ours, in attention to natural equity, by considering all assets as what we call equitable, and making no such distinctions as we do at law between simple contract and specialty creditors; It did, however, make a certain distinction of creditors, but upon a more reasonable discrimination; it distinguished three orders of creditors, *privileged, mortgagees, ordinary*; most of the privileged we have mentioned; such as for rent, law-charges, costs, funeral expences. Of mortgages we have treated, and the reason of their preference as to their specific lien is evident. So far the *heres* was forced to give a preference. Ordinary came in jointly, and shared in proportion to their debts. See Domat. book 3. tit. 1.

different, as may be seen above. If there be two judgments against testator, precedency or priority of time is not material, but he that first sues out execution shall be preferred, and before execution, the executor may satisfy which he pleaseth first. Where no judgment, commencement of a suit gives priority, but even after the commencement of such suit, the executor or administrator may still give a preference to other creditors of equal degree, by confessing a judgment to them for the real amount of their debts. 1 P. Wms. 295. And even without it, says Dr. Christian, if the suit be in Equity, and quotes 3 P. Wms. 401. *surely that authority is a contra.*

sec.

Lect.

sec. 5.

simple

Mer

Portio

Civil

cessor

even f

sessions

heir w

than t

events

was fur

former

as a r

IV.

the ex

(64) V

their tro

for so th

value.

acceptan

act out

undoubte

entitled

fixed, as

now with

next of

sec. 5. Debts of the crown were preferred to simple debts, where no mortgage.

Mention of the Falcidian Law, and Falcidian Portion perpetually occurs in the writings of the Civil Law, and demands explanation. The ancestor was forbidden to disinherit his heir at law even for cause, beyond three-fourths of his possessions: and he could not burthen his instituted heir with legacies which should consume more than three-fourths of the estate, so that at all events the heir, whether natural or instituted, was sure of one-fourth of the inheritance, in the former case as his natural right, in the latter as a reward for his labour and trouble (64).

IV. EXECUTORS.]—It is usually said, that the executor in our law is the same with the

(64) With us executors cannot claim any thing for their trouble or pains, nor trustees. 3 P. Wms. 351. for so the estate might be loaded, and rendered of little value. This sometimes seems a great hardship, tho' the acceptance of the office is voluntary, and they supposed to act out of mere friendship. Originally executors were undoubtedly supposed to profit considerably by being entitled to the undisposed residuum, but that never was fixed, as it was by the Falcidian Law; and they are now with us, if possible construed to be trustees for the next of kin.

instituted

instituted heir of the Roman Law, this I conceive to be an error, for they too had their executors in the latter times of the empire perfectly distinct from the instituted heir; and in fact created to check and curb him. They took their origin from the frequency of testaments made for pious causes, and to charitable intents, and were appointed in case the heirs were negligent in the execution of wills. The right of inheritance still remained vested in the heir. The executor had only *nudum ministerium facti* (65), he was merely to see that the will was properly executed; to him the execution was committed.

Whoever will take the trouble to peruse the 28th section of the 3d title of the first book of the Code, will, I think, see plainly how the practice originated (66). It begins by charging heirs,

(65) See Ayliffe, p. 372 and 373. This agrees with the definition of our executor given by Blackstone. The Treatise of Equity very correctly says, the executor is like the hæres in the Civil Law, only he takes nothing to his own use. Book 4. part 2. c. 1. f. 3.

(66) Indeed it would be extremely worth the pains of any ecclesiastical lawyer, or curious ecclesiastic, to peruse the four first titles of that book, which treat *de summa trinitate—de sacrosanctis ecclesiis—de episcopis & clericis*, and *de episcopali audientia*.

The

heirs, devisees and legatees, not to infringe bequests given, and trusts created for the redemption of captives: It proceeds to say, that if the testator has specially any person to transact the business of such redemption of captives, that person *legati vel fidei commissi exigendi licentiam habeat*; & *pro sua conscientia votum adimpleat testatoris*; it continues, that if no such person be appointed the bishop of the province shall have the like powers, *votum impleturus testatoris*, and concludes by strictly charging all persons connusant of embezzled charities, to give information thereof to the governor of the province, or the bishop of the diocese. Here then was a person independent of the heir, not interested in the inheritance, commissioned to get possession of the bequeathed property, to execute the will of the deceased, and to administer the property according to his wishes, and from hence by degrees the custom crept in

The difference between the Roman instituted heir, who always had a right to at least one-fourth of testator's property, and the modern executor will plainly appear, when the latter is considered, even as to the residuum, as a trustee for the next of kin, yet they are perpetually spoken of as synonymous.

of

of appointing such executors, and leaving little or nothing for the devisee, or residuary legatee to do, and perhaps leaving to the instituted heir nothing more than the Falcidian Portion (67).

In the wide ocean of the Civil Law we are liable to overlook many things, but I have not observed the name of executor expressly used in the *Corpus Juris Civilis*, before the time of the emperor Manuel Comnenus, under whom I find a constitution with this express title, *de executoribus testamentorum* (68); it recites that “multi
“homines in extremis suis dispositionibus procura-
“tores sive executores eorum quæ prescripserunt
“relinquunt, iis quæ Christo (dulci isto ac salutari
“mundo nomine) *herede scripto*, rerum suarum
“dispensationem atque administrationem adjun-
“gunt;” and that they do this principally when they bequeath their property to the poor. Here then it appears, that even where the whole administration of the property was committed to an executor, yet it was thought necessary to name an heir; and where they wished not for the possible interference of man, that to satisfy the

(67) Ayliffe seems to be of the same opinion, p. 372.

(68) *Constitutiones Imperatoriae*, p. 527.

regulations

Lect.

regula

Saviou

The

tended

of suc

the du

to the

the ch

of the

procee

incapa

with t

V.

WILL

GACI

tation

admit

of the

it can

law, a

the ma

adopte

cases v

where

(69)

lawry,

Office c

regulations of the law, the sacred name of our Saviour was introduced into the will.

The remaining part of the constitution is intended to prevent the laws delay upon occasion of such favoured and pious bequests, to enforce the duty of such executors, and to give powers to the præfect of the town and œconomist of the church to enforce or execute the intentions of the testator, making a due return of their proceedings to the Imperial Court (69). The incapacities of executors were much the same with those of heirs.

V. OF THE INTERPRETATION OF WILLS AND CONSTRUCTION OF LEGACIES].—Some general maxims of interpretation are too deeply rooted in human reason to admit diversity in legal science. That the will of the testator ought if possible to prevail, that it cannot however operate against the rules of law, and that the words ought not to outweigh the manifest intention, are positions universally adopted as just and reasonable: but many cases will occur by no means so obvious, and where wise lawgivers or interpreters may vary

(69) Persons attainted of treason and felony and outlawry, cannot be executors with us. See Wentworth's Office of Executors, page 17.

in opinion, without imputation on the judgment of any, E. G. Suppose two clauses in a will repugnant to each other, and giving the same things to different persons, which shall stand? In this case, by the Civil Law, as I conceive, the two hold it jointly or in common (70); and tho' in ancient times our jurists differed, and would have given it entirely to the later devisee, yet it is very observable that modern determinations have altered the principle, and coincided with the wisdom of the Imperial Law (71).

It is generally in our courts considered as a maxim, that in cases of doubt, or of doubtful expression, the heir at law is to be favoured, a position which may be carried too far, and which in its unqualified extent has been disputed by eminent men; the Civil Law, however, left no doubt of its partiality to the heir, of which it gives two remarkable instances in the Pandects, deciding in the one against a double or accumulative legacy, in the other, against the legatees claim of a larger estate, where a question had arisen whether a subject of the

(70) See Ayliffe, p. 379.

(71) 3 Atkyns, 493. Harg. Co. L. 112. 6.

same

Lect.

same n
both c

Am

confide

of the

de rebu

rule, a

ram sc

id quod

The

over th

a signifi

manifest

69.

Non

ni usu,

rule of

title of

and mo

also a n

(72) S

(73) S

by the p

testator at

thence ari

(74) T

technically

secuta, is

same name was intended to be bequeathed, and in both cases from declared favour to the heir (72).

Ambiguities were, if possible, to be cured by consideration of circumstances. The fifth title of the thirty-fourth book of the Pandects is *de rebus dubiis*; therein we find the following rule, *cum in testamento ambigue, aut etiam perperam scriptum est, benigne interpretari, & secundum id quod credibile est cogitatum: credendum est* (73).

The intention plainly collected was to prevail over the words, but not otherwise. *Non aliter a significatione verborum recedere oportet, quam cum manifestum est aliud sensisse testatorem.* Dig. 32. 1. 69.

Non ex opinionibus singulorum sed ex communi usu, nomina exaudiri debent, was another rule of interpretation to be found in the 10th title of the 33d lib. of the Digest. The cause and motive of making the will or bequest was also a material consideration (74).

(72) See Pandects, 30. 1. 39. 6 and 31. 1. 47.

(73) So with us general words will often be restricted by the particular occasion, and the circumstances of testator at the time of making the will, and probabilities thence arising will naturally come into consideration.

(74) This index of testator's intention, usually and technically referred to by the name of *causa data non secuta*, is particularly attended to by our law.

It is truly said that the interpretation of words in bequests, particularly of personalty, must be sought in the Civil and Canon Laws; it becomes therefore of great consequence to the common lawyer, and still more to the equity practitioner, to consult those codes upon the present subject (75). It cannot be expected that an elementary treatise of this kind can afford room for going into detail, over so vast a field; I must refer the reader to a long chapter of Swinburne, part 7. c. 10. (76) and to the doctrines delivered in the fourth book of the Treatise of Equity.

I shall, however, mention the interpretation which some few of those words which most frequently occur in testaments, bear in the Civil Law. Of the things which would pass under

(75) The Treatise of Equity expressly says, in regard that cases of wills of personal estate are for the most part tried in the Ecclesiastical Courts, and by the rules of the Civil and Pontifical Law, the king's judges must in such cases judge after the law of the church, that there may be a conformity of laws. Treatise of Equity, book 4. c. 1. f. 4. part 1. this the Master of the Rolls questions in *Cray and Willis*, 2 P. Wms. 530, and instances the case of a devise over, in case of a child marrying without consent being good in our law, not so by the civil.

(76) I always refer to the edition of 1743.

the

the na
triple c
a proli
would
law has
vexata
seem a
learned

Chate

others,
in the l
but it f

testator

money

bequest

Goods

to the l

long to

as grafs

trees, b

or any

industry

bles (78)

Move

may rec

dead, w

(77) S

(78) S

the name of *goods*, Swinburne, after giving a triple definition of the word itself, has arranged a prolix nomenclature; even debts and leases would pass, and hence the construction of our law has been the same: this, however, was long a *vexata questio* among the Civilians, and does not seem at last to have met the approbation of that learned Civilian.

Chattels.]—It is observed by Swinburne and others, that chattels is a word more obvious in the laws of this realm than in the Civil Law, but it seems to be settled that the whole of the testator's personal estate, and consequently his money among the rest, will pass by a general bequest of *all his goods*, or of *all his chattels* (77).

Goods immoveable.]—These words give a right to the leases or leasehold interests which did belong to deceased, and to the natural fruits thereof, as grass growing on the ground, and fruit on the trees, but not to corn growing in the ground, or any industrial fruits, i. e. produced by men's industry: they are counted among the moveables (78).

Moveables.]—Under *moveables* a legatee may recover all personal goods, both quick and dead, which either move themselves, as horses,

(77) See Swinburne, part 7. sec. 10.

(78) Swinburne, page 503.

sheep and oxen, or can be moved by another, as plate, household stuff, corn in the barn or in the sheaf, and natural fruits if gathered, not *fructus pendentes*, and also corn growing, if it were sown in time, before the expiration of the term, so that testator might have reaped it, if he had lived till Harvest (79).

Upon several of the preceding words there have been considerable contests, as for instance, whether ready money should pass under *chattels*; but of all expressions, *household stuff* seems to have given rise to most contention. The whole tenth title of the 33d book of the Pandects is *de supellestile legata*. And in modern times, tho' no doubt can be entertained that cattle, carts, vessels affixed to the freehold, and many other things enumerated by Swinburne (80) are not to

(79) Swinburne, part 7, sec. 10. p. 301. *Alimentum* maintenance, comprehended food, cloathing, dwelling, education, and even if the situation in life of the legatee demanded it, servants and horses. Dig. 34. 1. *de alimentis legatis*. *Pradium instructum* passed every thing upon it. *Pradium cum instrumento*, only the things necessary for cultivation.

(80) It is remarkable that upon this subject and several others of a similar kind, the Treatise of Equity has borrowed from and copied Swinburne verbatim, without mentioning the loan.

be reckoned among household stuff, and that apparel and books (81) are excluded by the Civil Law, yet great contests have arisen, whether plate and coaches, or such like equipages, are to be classed and included under the general name of household stuff. The determinations are, that plate will pass, if considered by testator, not as merely ornamental, but as part of his utensils, i. e. if the testator was in a rank in life which rendered plate an article suitable to his domestic establishments, and Swinburne is of opinion, that coaches and ornamental carriages are to be numbered among household stuff.

In analysing the interpretation of words in testaments, I have been insensibly carried into the construction of legacies, for in strictness it was in them only, and not in the universal devise to the heir or universal successor, that such questions could occur.

Legacies, however, or particular successions, deserve a separate and more minute discussion, both on account of the very special and particular consideration bestowed upon all their various cases by the Civil Law, and also because its de-

(81) A library does not pass by this name. 3 Atk. 202.

cisions thereupon have generally been followed by the courts and judges of these realms.

The four distinctions of legacies known to the early Romans, and the discriminating lines between legacies direct, and legacies in trust, were all done away by Justinian. The Civilians after discussing the cases of *uncertainty* and *error* in legacies, consider them as *conditional*, *alternative*, *accumulative* or *double* (82), and then proceed to the points of *abatement*, *ademption*, and *translation*, together with the question when interest shall be allowed upon them (83).

Of Uncertainty.]—This may respect the legatee, or the thing bequeathed, and in the first instance may arise from no person being *named*, or from two persons having one and the same name. If no person be named, of course the legacy must be void, and by the earlier Ro-

(82) Our law usually divides them into specific and pecuniary, vested and contingent.

(83) On many of these points, as Mr. Woodeson observes, the Court of Chancery has very unreservedly referred to the rules of the Roman Civil Law, as principles of decision, and the same author in another place truly says, in all testamentary matters of a personal nature, our courts have availed themselves of the wisdom and experience of the Civilians.

man

Lect

man I

I give

in mar

legacy

ing to

that le

if the

they re

If th

the leg

of ther

tended,

or near

be stron

to fail fi

intende

one in

parish

the poo

pious a

failure

Unce

most usu

(84) S

(85) S

cific desc

Chancery

pearing, c

man Law such a description of a legatee as this, I give to *Whoever shall give his daughter to my son in marriage*, was too uncertain to make good the legacy. But Justinian amended the law according to reason, and its ultimate regulation was, that legacies might be given to uncertain persons, if the testator's meaning could be found out, or they rendered certain by the event (84).

If there were divers persons of the same name, the legacy was void for uncertainty, unless one of them was able to prove himself the person intended, of which his being the intimate friend or near relation of the deceased was allowed to be strong proof. But charitable legacies were not to fail from the want of certainty as to the object intended. If to a church without naming any one in particular, it would be interpreted the parish church of the deceased; if to the poor, the poor of his parish; but at all events, the pious astuteness of the law would prevent the failure of his good intentions (85).

Uncertainty as to the thing bequeathed must most usually proceed, from the bequest being too
general

(84) See Inst. lib. 2. tit. 20. sec. 25. et deinceps.

(85) So with us in gifts to charitable uses, if no specific description of object be pointed out, the Court of Chancery will, in respect of the general purpose appearing, direct the mode of giving it effect. Attorney

general and not sufficiently definite, and even neglect to express the quantity was fatal by the Civil Law; but Swinburne observes, that the equity of our Ecclesiastical Law admits such legacies, leaving the quantity to the discretion of the ordinary.

This uncertainty must frequently produce a question of *option* or *election*. E. G. if the testator bequeathed a horse, having many, who should chuse? the election belonged to the heir if the words were directed to him, as I will that my heir shall *give* A. B. a horse; to the legatee, if directed to him, as I will that A. B. *shall have* a horse, but in the former case the heir must not chuse the very worst, nor in the latter the legatee elect the very best (86).

Error.] This may be in the person, in the name, or the quality of the devisee or legatee.

General v. Henrick, Ambler, 712. collateral proof may be admitted to make certain the person or thing described. See Treatise of Equity, book 6. ch. 2. sect. 6. and the cases there cited. Covenant designed for the benefit of the church, if possible to be specifically performed, 2 Eq. Ca. Ab. 17.

(86) He who ought to do the first act shall have the election, by our law. Co. L. 145. a.

If a man grant one of the horses in his stable, the grantee has his election to take which he pleases. Co. L. 145. a.

If

Lect.

If it
perform
legacy
scripti
be asc
a mist
was n
final
gacy
thing
tive o

Con
and fi
of the
first,
if the
day o
lapsed
were

(87)
demonst
Legacy
ters the
p. 85.
the nam
(88)
(89)
quest m

If it could be proved that the testator meant one person, but by mistake mentioned another, the legacy to the latter was void, but a wrong description would not vitiate, if the person could be ascertained (87). The same rule held as to a mistake in the name. An error in the quality was not hurtful unless that quality were the final cause, wherefore the testator gave the legacy (88). An error in the proper name of the thing did not vitiate, but in the name appellative of it did, for that was in the substance.

Conditional Legacies.] If the legacy was pure and simple it became due the day of the death of the testator, and therefore if the legatee died first, it lapsed and was not transmissible; but if the legacy was conditional it became due the day on which the condition was performed, and lapsed if the legatee died before that day. These were the general rules (89), but there were many

(87) See 2 Inst. lib. 2. tit. 20. sect. 30. *De falsa demonstratione*, ibid sect. 29. *De errore in nomine legatarii*. Legacy to the two daughters of A. A. has three daughters they shall all take. *Stebbing v. Walker*, 2 Brown, p. 85. 'To James second son of A. he was the third, the name prevails over the order.

(88) Ibid. sect. 31. *De falsa causa adjecta*.

(89) So they are in our law, but as to the first a bequest may be so worded as to prevent lapse, 3 Atkyns,

many exceptions and distinctions, among which none is better known to our law than that between time annexed to the substance and to the payment of the legacy ; in the former it did lapse, E. G. if the words were *when or if* A. B. shall arrive at twenty-one, (90) in the latter was transmitted to representatives of legatee, E. G. if they were *to be paid* when A. B. shall be of the age of twenty-one.

The law distinguished between a *conditional* and a *modal* legacy, *i. e.* one in which the mode or manner of applying the legacy was mentioned, as so much to bind a boy apprentice, or to erect a

372. 380. and as to the latter, there are many cases in which it is *debitum in presenti*, tho' *solvendum in futuro*, vested and transmissible. See them collected 2 Fonbl. p. 374.

(90) Lands devised in this manner will descend to the heir, 3 Term R. 41. All that the Civil Law has said upon the subject is applicable to what we call real, as well as to personal estate. An estate to A. and his heirs, if A. dies before testator, the devise is void, as appears from every case from Brett and Rigden in Plowden, to White and White, a case from Ireland, not many years since determined by the Lords in England, where the testator's intentions in favour of his grandson by his eldest son deceased, were forced to bend to the rules of law which gave the property to his second son.

monument,

monument, in these cases the legacy was vested and due immediately, and did not lapse by the death of the legatee, and our law agrees. *Barlow v. Grant*, 1 *Vernon*, 255. See *Swinburne*, p. 253.

Under conditional legacies we must again advert to those conditioned in restraint of marriage. I have before said, that by the Civil Law all conditions in restraint of marriage were void, as contrary to nature, and hurtful to the community, and marked the diversity between that and our system on the subject (91). I must be understood to mean, however, prohibitions of marriage altogether, for if it was only in part restrained, in respect of time, place, or person, the Civil Law agreed with ours, for this was only protecting the individual from the consequences of hasty, rash, and improvident matches.

Under the head of lapsed legacies, I must also again observe, (92) that there was no survivor-

(91) *Book 1. Lect. 1. p. 35.* and *Introductory Lectures*, p. 38. Unreasonable conditions in legacies were null, as to be decollated or consumed in lime from fear of inhumation alive, were deemed such. But was it not too great a latitude to annul conditions tending to quiet the departing soul, and founded in apprehensions proved by experience, to be not altogether groundless?

(92) See note to p. 176. in the *Lecture on joint-tenancy*.

ship

ship among legatees by the Civil Law, but that ours differs in that respect (93).

Alternative Legacies.]—In this case there was but one legacy, as if the testator bequeathed his estate at Tivoli, or his estate at Brundisium, the legatee should have but one of these estates, but he had his option which he would take; if property was given to A. or B. they took jointly.

Accumulative Legacies.]—They might be either accumulated upon another legacy, upon a child's portion, or upon a debt due. In the first case if they were pecuniary, and given by the same will, the presumption was against the legatee, but if the two pecuniary bequests were in different writings, as E. G. in a will and a codicil, whether the latter was more or less, or equal to the former, it was to be construed accumulatively, the presumption was in favour of the legatee (94); but if it was a specific thing, a *corpus* as the Civil Law terms it, it could not be devised twice, the legacies were not held to be accumulative, for *eadem quantitas sæpius præstari posset, non vero eadem res*. But these rules being only applied to, where there was no internal

(93) As appears from the case of Northey and Burbage, Gilb. Rep. 137. and Buffar v. Bradford. 2 Atks. 210.

(94) *Cæteris paribus, a testator must be supposed to mean a benevolence.*

evidence of the intention, of course yielded to that intention if it appeared manifest (95).

As to double portions the general tenor of cases, (and upon this subject the principles of the Civil Law cannot be better illustrated than by the decisions of our Courts of Equity,) seems to have been to lean against them, *i. e.* that a legacy shall be construed to be a satisfaction, unless there are circumstances to shew that it was not so intended. To this, however, there are numerous exceptions as when the provision by the will is inferior, and whether there can

(95) See particularly Dig. 34. 4. 9. and also Dig. 22. tit. 3. de probationibus & presumptionibus and Swinburne, L. 50. these rules have been most clearly illustrated by Mr. Justice Aston, and the Lord Chancellor, in Hooly and Hatton, and by Lord Thurlow, in Ridges v. Morrison, 1 Brown, 389. who all evince their knowledge of the Roman Law, and whose example ought to be the strongest incitement to its study.

A larger legacy given to the same legatee in a will after a less, legatee shall take both. Curry v. Pill, 2 Brown, 225. so that the rule of the Civil Law seems only to have been followed where the legacies in the same writing were equal in quantity; in Coote against Coote, 2 Brown, 526. a second codicil appearing to be only a repetition of the former, with the addition of a simple legacy, the legacies were not doubled; but the most remarkable point in that case, was that parol evidence was read, to shew they were not intended as accumulative, See p. 525. 2 Brown, for the reasons given.

be

be any general rule, was vehemently disputed in the case of *Hanbury and Hanbury*, 2 Brown's Rep. p. 352. where all the cases on the subject are collected, and in which an eminent advocate declares he could find but two cases, and those governed by very special circumstances, where a legacy was not construed to be a satisfaction of a previous portion.

Where a father makes a provision for a child by his will, and afterwards gives to such child a portion in marriage, or for establishment in life, of equal or greater amount than the legacy, it is an implied ademption of the legacy (96).

I proceed now to the third case, viz. of a legacy bequeathed to a creditor by his debtor. The presumption here *prima facie* was, that the legacy was to go in satisfaction of the debt, for that the testator must be supposed to be just before he is kind, and the maxim of the Civil Law was *debitor non presumitur donare*. But this presumption was carried too far, and if the legacy be less than the debt, or on condition, or on a contingency, or not equally be-

(96) See the exceptions to this rule collected by Mr. Fonbl. 2 vol. p. 554. How far a wife shall have both a legacy and a provision, covenanted at the time of marriage, See *Babington v. Greenwood*, 1 P. Wms. 531. *Eastwood and Vinke*, 2 P. Wms. *Richardson v. Elphinstone*, 2 Vesey, jun.

neficial

neficial with the debt in any particular, it has not been construed to go in satisfaction, but accumulatively. So if the thing were of a different nature, thus land was not to go in satisfaction of money (97).

(97) Inst. 2 Lib. These principles are found among other places in the second book of the Institutes, lib. 20. sect. 14. which is *de debito legato creditori*. Tho' our Courts of Equity have followed them, yet where the testator has left wherewithal, and shewed his intentions so to be, he has been construed to be both just and bountiful. See Salk. 155. Cuthbert v. Peacock, and Chancey's case, 1 P. Wms. 408.

A legacy cannot be counted a satisfaction of a debt contracted after the will made, 1 P. Wms. 299.

So if the debt was upon an open or running account, *ibid*.

Legacies naturally imply a bounty, and therefore in Clark v. Sewell, 3 Atks. 97. the maxim, *debitor non presumitur donare* would not hold said Lord Hardwicke, if it were now to be reconsidered.

The Courts of late have not altogether disavowed this doctrine of satisfaction, yet they have been very inclinable to lay hold of any circumstances to distinguish the latter from the former cases. 2 Vesey, 636.

Any minute circumstance is laid hold of to evade the rule of a legacy larger or equal to a debt, being a constructive satisfaction.

The points of abatement and interest may be very briefly discussed; as to the first, the heir whenever he paid legacies, might demand caution from the legatees that they would refund, if there were a deficiency of assets (98). Ayliffe, p. 377. but charitable bequests were not to abate in proportion with the rest. Nov. 131. ch. 12. and as to interest, the rule is thus briefly laid down in the Pandects, 30. 1. 23. *si quis bonorum partem legaverit sine fructibus restituitur, nisi mora intercesserit hæredis*. The heir was not accountable for the fruits, unless he had been in delay, if for instance, he refused to pay because they objected to his retaining the Falcidian Portion, he paid not interest, for the delay was not his (99).

(98) With us pecuniary legatees abate in proportion, but not specific legatees. Charitable legacies abate equally with others.

(99) If a legacy be charged on land, and no time of payment mentioned in the will, it carries interest from testator's death, so if upon productive personal estate as out of mortgages, or stock yielding interest or profit; *causa patet*. But if it be to come generally out of the personal estate, and no time of payment mentioned, it shall carry interest only from the end of the year after the testator's death.

Ademption.]-

Lect

Ad

struct

it in

from

the th

withou

the leg

testato

built

the no

life-tim

ther th

but if

straine

causes,

the leg

the pr

the hei

The

as an

paymen

(100)

tion rei

(101)

(102)

(103)

(104)

Ademption.—This might ariſe from the deſtruction of the thing bequeathed, from calling it in if it was a debt due to the teſtator, or from the improper conduct of the legatee. If the thing bequeathed perished before delivery without the fault of the heir, the loss fell upon the legatee (100); so if it be changed, as if the testator pulled down the house bequeathed, and built another, the bequest did not extend to the new edifice (101). If the testator in his life-time alienated, or gave the thing to another the legacy was extinguished of course (102); but if the alienation was not voluntary, but constrained by temporary poverty, or some such causes, many Civilians have insisted, that either the legacy was not extinguished, or at least the proof of altered intention was thrown on the heir (103).

The calling in a debt due, was considered as an ademption, the receiving it as voluntary payment not so (104); yet even the former rule

(100) Inst. lib. 2. tit. 20. sec. 16. *de interitu & mutatione rei legata.*

(101) Dig. 30. b. 5. sec. 2.

(102) Dig. 34. 4. 18.

(103) Dig. 32. 11. 12.

(104) Dig. 32. 11. 13.

is by no means satisfactory, as he might have called it in, merely from apprehension of the security (105), and ademption of legacies is not to be presumed.

Other causes of ademption were peculiar to the Roman Law, as if the legatee had grievously injured or wounded the testator, or great enmities had subsisted between them; rules opening a license for controversy and difficulties in proof and practice, wisely avoided by our law, for who should determine the gradations of ill will which should or should not be construed to extinguish the legacy (106).

(105) That distinction has been exploded with us, but another is made between a specific legacy and one *in numeratis*, viz. that the former is lost by being altered, not the latter. See Treatise of Equity, book 4. part 1. c. 2. f. 2. and the cases mentioned in the note.

(106) Pandeets, lib. 34. tit. 3. f. 11. *Si quidem capitales vel gravissima inimicitia intercesserint, ademptum videtur quod relictum est; sin autem levis offensa, manet fidei commissum.* I must here observe, that simple legacies, and legacies or bequests in trust, are generally considered together in the Digests. The 30, 31, and 32, books of the Digests are entitled, also the 1, 2, and 3, *de legatis & fidei commissis*, and treat entirely of them.

Before

Before I quit the subject of legacies I must remind the reader of what was said in the Lectures on Jointenancy, that by the Civil Law there was no survivorship among legatees, a rule followed by our Ecclesiastical Courts, and strongly urged in the Court of Chancery, but by the latter tribunal repelled (107).

After legacies the Institutes treat of trusts and substitutions; the latter have been explained in the chapter of Remainders, and what is said on the former seems little interesting to the modern advocate. These chapters of the Institutes treat principally of laying equal burthens on the heir, and the person for whom he held in trust, when such a trust was created, because originally the heir felt the whole bur-

(107) *Webster and Webster*, and *Cary and Willis*, 2 P. Wms. are cases in which it was controverted whether a legacy being given to several persons, they should be jointenants, according to the rule of the Common Law, or tenants in common, according to the rule of the Civil, and that of the Ecclesiastical Courts, which admit of no survivorship; determined in favor of jointenancy, and in the latter case, as I have before observed, the Master of the Rolls says, that he does not see that a Court of Equity should, even in case of a legacy, judge according to the rules of the Civil Law.

then

then in such cases without any benefit, and thereby the legatee, or cestuyque trust (if we may call him so) suffered, because the heir would not accept the inheritance, and thereby the legacy or trust sunk also. To remedy this provisions were made, that if the heir was a mere instrument of transfer to the cestuyque trust, and derived no benefit, he should not be subject to debts, or feel any burthen : or at least as he retained his Falcidian Portion against the cestuyque trust, as well as against legatees, that the debts should be divided proportionably between them (108).

VI. HOW WILLS MIGHT BE AVOID-
ED.]—They might be rendered null and void by *cancellation—express revocation—a later testa-*

(108) It must be observed that tho' the *fidei commissa* of the Romans are perpetually compared to our trusts, the resemblance is very remote. The heir took the estate on trust to hand it over to another, the latter then had an inchoate right or claim, but no actual estate; those were not two contemporaneous estates one legal the other equitable, one in the trustee, the other in the cestuyq. trust. The *fidei commissary* therefore, tho' called cestuq. trust, as a sound familiar to our ears, is not called so in our sense of the words, nor can we learn much from their doctrine of trusts.

ment

Lect

ment—
by f
to w

pitis
libera

avoid

dent,

in or

shewn

if the

be pre

it was

consulta

lent, fa

Exp

privile

be sim

ments

(109)

lation i

Burten

it was d

doth no

there ar

tody, th

is in his

ment—implication—inofficiousness—imperfection, or by shewing that they were unduly obtained, to which we must add *adoption*, and the *capitis diminutio*. Cancellation or obliteration deliberately done must be allowed sufficient to avoid a will, but as it might happen by accident, and is *prima facie* an ambiguous act, in order to make it a revocation, it should be shewn if possible *quo animo* it was cancelled; and if there be a controversy, who did it, it will be presumed to be done by him in whose custody it was (109). *Quæ in testamento legi possunt, ea inconsulto deleta, nihilominus valent; consulto, non valent*, say the Pandects, 28. 4. 1.

Express revocations either of legacies or of privileged testaments might, by the Civil Law, be simple, naked, or even verbal. Thus, testaments *ad pias causas*, and military testaments

(109) One of the most remarkable cases upon cancellation in modern times is reported in Cowper, p. 49, *Burtonshaw v. Gilbert*, in which, among other points, it was determined that the act of cancelling a latter will doth not set up a duplicate of the former, and that where there are duplicates of a will, one in the testator's custody, the other not, and the testator cancels that which is in his custody, it is an effectual cancelling of both.

might

might be revoked, but solemn testaments were to be solemnly revoked (1110). Wood says generally, that verbal revocations were not valid, but his authority, viz. Inst. 2. 17. 7. does not support him, relating only to the Emperor.

Later testaments to revoke those antecedent, must be perfect in every respect. *Tabulae priores*

(1110) See Swinburne, p. 531. The statute of frauds enacts, that no demise in writing of *lands, tenements, or hereditaments*, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all demises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his direction in manner aforesaid, or unless the same be altered by some other will or codicil in writing or other writing of the deviser, signed in the presence of three or four witnesses declaring the same. Sec. 6.

And no will in writing *concerning any goods or chattels or personal estate* shall be repealed, nor shall any clause devise or bequest therein be altered or changed, by any words, or by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof, read unto the testator and allowed by him, and proved so to be done by three witnesses at the least.

jure

Lect.

jure fa
book,
perfect
Nor v
second
of the
the pa
ceptio
testam
invali

(111
Wins.
where
merely

It is
tator's
prefsly
shaw a
of a w
the fan

The
cations
stances
as well
Where
riage a
cation,

jure factæ, non irritæ sunt, say the Institutes, 2 book, title 17. §. 7. *Nisi sequentes jure ordinatæ perfectæ fuerint*. See also Code. b. 23. 21. 3. Nor was the instance given in the same title of a second testament invalid by the non-acceptance of the heir, revoking a former and occasioning the *pater familias* to die intestate, sec. 2. an exception to the rule, because there the second testament was perfect in itself, though rendered invalid by matter *ex post facto* (111).

Implied

(111) Our law agrees. See Onions and Tryer. 1 P. Wms. 343. But a difference of solemnities is prescribed where a will is to operate substantively, and where it is merely to revoke a former.

It is said also, that it must be a subsisting will at testator's death, 4 Burr. 2512. unless the second will expressly revoke the first, which was the case of Burtenshaw and Gilbert, mentioned before. The republication of a will once reversed with us must be attended with the same solemnities as the original making.

The statute of frauds does not extend to implied revocations, and it is agreed, that an alteration of circumstances may operate as a revocation of a will of lands, as well as of personal estate. See 1 Abr. Cas. Eq. 413. Where the whole estate is disposed of, subsequent marriage and the birth of a child form a presumptive revocation, liable however to be rebutted by evidence. See

Implied revocations were familiar to the Roman Law, thus the birth of children operated as a revocation of a precedent will. See Inst. 2 lib. tit. 13. sec. 1.

Imperfect testaments might be so in respect of

Brady and Cubit, Douglas p. 31. Lord Northington and Doctor Hay were of opinion, that marriage singly would not revoke a will of *personalty*, for in real estate the question does not occur. Mr. Fonblanque has advanced a contrary opinion, admitting however, that the presumption is liable to be encountered by every circumstance indicative of a contrary intention. Treat. of Eq. 2 vol. page 360. In a very strong case marriage was held to be a revocation of the will of a woman. Hodsdon and Lloyd. 2 Brown's Ch. 534.

Another great point of dispute has been, whether the birth of a child simply, shall operate as a revocation. Dr. Hay, in the remarkable case of Shepherd and Shepherd, held it did not, and the Roman rule being referred to, and it being insisted that the Roman Law in general guides the decrees of the Ecclesiastical Courts, (he answers) no further than it stands uncontradicted by the English. But Mr. Fonblanque insists, that it is not so contradicted, and that our rule is the same; and in answer to the observation, that children are not with us considered as having a property in the effects of their father as they were at Rome, replies, though not an indefeasible property or legal right to any part, yet they have a natural and moral claim.

solemnity,

Lect.

solemn
we ha
to wil
preven
or oth
ferred

there
was v
done
of the
The
rule,

(112)
estate v
lay fra
tated,
fraud a
sense a
been eff
far as t
ed to ac

(113)
it be v
which v
another
fas whi
void or
nion th

(114)

solemnity, or in respect of will. Of the former we have treated (112). Imperfection in respect to will might be either when the testator was prevented from finishing his testament by death or other impediment, or having voluntarily deferred its completion, death intervenes, and there is no question that by the Civil Law it was void in such cases, even as to the part already done (113), though it were the testament even of the father among his children (114).

The rigour of the Civil Law adopted the same rule, where the testator himself deferred the

(112) No want of solemnities affects a will of personal estate with us; 'The most ragged and dirty papers, I may say fragments in testator's hand writing or even dictated, and not regularly witnessed, where no suspicion of fraud and they could be put together so as to collect the sense and there appeared no imperfection of will, have been established as testamentary dispositions, at least so far as to be directions to the administrator who was obliged to act with them, as *cum testamento annexo*.

(113) Swinburne makes a great question, whether it be void *jure gentium*, and therefore by the law which we use in England; and makes that depend on another question viz. whether a testament *ad pias causas* which is also governed *jure gentium* be in such cases void or not, as to what is already done, and is of opinion that it is not.

(114) Swinburne, part 7. p. 519.

finishing his testament and died, or was otherwise prevented from giving it perfection.

But if the testator having declared his whole will for the present, reserved something to be done at another time, and in the mean time died (115), the testament was perfect notwithstanding.

As to wills unduly obtained, the variety of fraud and influence which might be used for this purpose is not reducible to limitation or description, and is on every account the subject of pictures too melancholy to arrest the disgust.

(115) Swinburne, *ibid.* And Swinburne insists, that in both cases our law establishes what has been done; *it must be understood as to personalty since the statute of frauds, and that the clauses in the part done are perfect.* But if the testator declares that he means to make alterations in the part already made, and dies without making them, the will, though of personalty, ought not to be established, for no man can tell where he meant to alter, and it is not his will.

If a paper writing of a testamentary nature *as to personalty* be found, whether it shall be a draught only or a testament, must depend on a variety of circumstances, for which I must refer the reader to Swinburne, part 7. sec. 13.

The 22d and 23d title of the 6th book of the Code *de testamentis*, should be diligently perused by the student.

Lect.

ed ey

it. I

fatirif

the co

Ino

that

childr

passed

cause

prevai

had a

custom

child.

sons,

that

(116

between

neral r

circum

admit

has be

relentin

mining

position

ty, if

down b

ral in

vilians

cateris

ed eye, longer than they force themselves upon it. It is one of the great themes of the Roman satirists, and too often the subject of horror in the countries in which we dwell (1116).

Inofficious Wills.]—It is now generally known that by the Civil Law, a will was void, if children in *the power of the father*, were therein passed over in silence or disinherited without cause; and that a silly and false opinion has prevailed among the ignorant, that our law had adopted the rule; which gave rise to the custom of leaving a shilling to a disinherited child. The Civil Law had its peculiar reasons, which I have often mentioned, viz. that the child *was considered as one and the*

(1116) The limits of undue influence, and the lines between it and laudable attention, are too nice for general rules, and in every case must depend upon its circumstances. Some cases are too strongly marked to admit of doubt, as where the bounty of the testator has been diverted by gross misrepresentation, or his relenting mind not suffered to feel the whole determining effect of the supplications of a child. But the positions of Swinburne, as to flattery and importunity, if admitted to be law in the wide extent laid down by him, would make wild work indeed. In general in such cases, as I have been told by learned Civilians in England, the disposition of their courts, is *ceteris paribus*, to lean in favour of the will.

same

same person with the father, as having a property in his effects, and therefore prima facie entitled to continue the management of his own estate. But if he was mentioned in the will, and the cause expressed, he might be disinherited, provided it was one of the causes allowed by the law. Among these were striking or cursing, killing or endeavouring to kill the parents, accusing them of capital crimes, and even refusing to be security for them. Heresy in the son was a sufficient cause—nay, his disgracing himself, as by going on the stage, with many others to be judged of by the magistrate; but the privileged will of a soldier could not be inofficious.

Adoption and change of state.]—A will at Rome was also void, if the testator suffered a diminution of his liberty, or of the rights of the city by way of punishment, or was condemned to death (117); and also by the agnation of an heir, when a person had by arrogation adopted a son (118). These provisions peculiar to the Roman Law, do not merit to be dwelt upon by us.

VII. PROBATE OF WILLS.]—The pub-

(117) Dig. 28. 1. 8. 1. For the three kinds of *capitis diminutio*. See book 1. p. 55. above.

(118) Inst. 2. 17. 1.

lication

lication or probate of the will, was to be made before a competent judge, and at Rome this judge was the *Magister census*. The bishops endeavoured to intermeddle with this power, founding their claims, on their being the legal overseers, (as they were) of the administration and fulfilling of pious and charitable bequests. Justinian interfered and forbade Ecclesiastical Jurisdictions to meddle with testamentary causes. In later times of the Empire, however, they appear to have claimed this authority with success (119).

The mode of authentication was by inrolling it in a public registry (120), (after it had been opened in a solemn manner,) resembling our prac-

(119) That the county courts formerly had jurisdiction of wills,—the separation of the Bishops and Sheriffs Courts in the reign of William the Conqueror,—and the Spiritual Courts gradually drawing to themselves the cognizance of wills, (until in the reign of Henry II. they appear to have got it exclusively) are historical facts, universally known to men of the legal profession.

(120) *Testamenta omnia ceteraque quæ apud officium censuale publicari solent, in eodem loco reserventur, nec unquam permittatur fieri ulla translatio.* Code 6. tit. 23. sec. 18.

tice

tice of enrolling deeds in a Court of Record (121), and then, tho' the original was lost, credit was given

(121) Probate with us is in common form, by taking the oath below recited, where no question is raised upon the will, and this should not be administered till fourteen days after testator's decease, to give time for objection, if there be any, or if a caveat be entered.

Probate in special form is by examining the witnesses to the will, or other sufficient proof, where opposition is given to its establishment.

I have for the use of practitioners inserted the oath of an executor and administrator, *as now administered*.

Oath of an Executor.—You swear you do believe that the writing hereunto annexed doth contain the last will and testament of (A. B.) deceased, that you will well and truly execute and perform the same, that you will pay all such debts as the deceased owed at his death, and all legacies by him in his said will bequeathed, so far as his goods, rights, credits and chattels will thereunto extend, and by law you are bound; that you will make a true and perfect inventory of all and singular the goods, rights, credits and chattels of the said deceased, which have or shall come to your hands, custody, possession or knowledge, and the same so made will exhibit, or cause to be exhibited into — Court of — in Ireland, and that you will give a just and full account thereof unto the

said

given to the registered copy (122); thus the Code 6. book 23. title *de testamentis*, sec. 2. says,
Publicati

saïd court when you shall be thereunto lawfully called and required.

Oath of an Administrator.]—You swear you know of no will made by the deceased, that you will well and truly administer all and singular the goods, rights, credits and chattels of the said deceased, that you will pay all such debts as the said deceased owed at the time of his death, so far as his goods, rights, credits or chattels will thereunto extend, and by law you are bound, that you will make a true and perfect inventory of all the goods, rights, credits and chattels of the said deceased, which have or shall come to your hands, custody, possession or knowledge, and the same so made will exhibit, or cause to be exhibited, into the Registry of ————Court of ————in Ireland, *within the time limited by the said court**, and that you will also give a just and full account thereof unto the said court when you shall be thereunto lawfully called and required.

(122) With us, as every person knows, the original is deposited: the probate or authenticated copy with the seal and authority of the court is given out. And tho' the probate is of no avail as to real estate, yet as wills

* I have omitted this clause in the one Oath, and inserted it in the other, but it is usually omitted, as having been found to produce much unintentional perjury.

Publicati semel testamenti, in qua primum a testatore scriptum relictum fuit casu qui probatur intercidit; nihilominus valet.

VIII. BONORUM POSSESSIO.]—The four first titles of the thirty-seventh book of the Digests or Pandects treat *de bonorum possessionibus* (123). This possession of the goods was given

for the most part consist of mixed bequests and devises of real and personal estate, they are generally proved in the Spiritual Courts.

I cannot but lament here, a circumstance I believe not generally known, that the great depository of wills in this kingdom, those most important muniments of property, is at present in no manner protected from fire, but on the contrary in a most remarkable manner exposed to it, from the construction of the building, and nature of its vicinity, a circumstance by none more lamented than the conservator of them: it ought to be an isolated and specially constructed edifice.

(123) It has been often said that the administration, granted by the ordinary, is not unlike the bonorum possessio granted by the Roman Prætor, which leads me here to speak of administration. I am not called upon in Lectures upon Civil Law to go deeply into the doctrines of modern administration, they are generally well known; some cases that occurred within my own experience, and which appeared to me new and curious and some rules not universally known, will be given in the second volume.

I shall

given by the Prætorian authority from justice, where those who had equitable claims, could not support their title at law; or from necessity, where

I shall, however, here briefly note who are entitled to administration, with the different kinds of administrators, and observe on the different effects of probate and administration as to suits, and as to transmission of rights.

Who are entitled to administration.]—I. The ordinary is compellable by statute 28 H. 8. ch. 18. in Ireland, to grant administration of the goods and chattels of the wife to the husband, or his representatives, and if he survives the wife, to his next of kin—and of the husband's estate to the widow or next of kin, either or both at his discretion.

N. B. Joint administrations are not favoured, as productive of contention, and *ceteris paribus*, the widow is usually preferred.

II. Among the kindred, those that are nearest in degree to intestate are to be preferred, reckoning according to the computation of the civilians, children, parents, brothers, grandfathers, uncles or nephews, and the females of each class respectively, lastly cousins, and of persons in equal degree, the ordinary may take which he pleases.

III. Half blood is admitted as well as the whole, thus a brother of the half blood excludes an uncle of the whole—and administration may be granted to sister of

where the persons legally entitled refused to act. Emancipated sons, and heirs disinherited by inofficious wills afforded instances of the former, and the want of a will, or its concealment frequently gave occasion to the latter; the grant might

the half, or brother of the whole, at ordinary's discretion.

IV. If the kindred refuse it may be granted to a principal creditor.

V. If an executor refuses or dies intestate, administration may be granted to a residuary legatee.

VI. In defect of all these, ordinary may chuse any discreet person. If administration be granted contrary to the statute it is not void but voidable. 1 P. Wms. 43. If administration be granted to the next of kin, the ordinary cannot revoke it without cause, and he may be compelled by mandamus to grant it to the person entitled. Comyns. Admn. b. 7.

Different kinds of Administration.—Besides the general administrator hitherto described, administration may be granted for special purposes, or for limited times, as *pendente lite*, *durante minore etate*, *durante absentia*.

To substantiate a suit in Equity, and make a decree perfect by having a personal representative before the court. it is often necessary to apply to the Ecclesiastical Court to grant administration to the nominee of the party, which was usually granted only for that special purpose

might be *decretal* and temporary, till it was known who had the real right of possession like that to an *administrator pen. lit*; or it might be *edictal*, when there was no occasion to hear parties judicially: the latter again might be *secundum tabulas*, where the heir instituted by strictness

purpose. Much mischief having arisen from such partial administrations, the Court of Prerogative now in compliance with the wishes of the Court of Chancery, (which indeed refused to attend to such administrations,) insists on such nominee taking administration generally.

The other species of administrations explain themselves, and are grantable to any proper person at the discretion of the ordinary, they not being within the statute. For the powers of these administrators see Walker and Woollaston, 2 P. Wms. 576.

Different effects of Probate and Administration, and of Administration granted wrongfully or by mistake.—Executor may grant, and release, and commence an action or suit in Equity before probate, but not maintain one. Administrator cannot commence an action before administration granted; Executor may also release or pay a debt, assent to a legacy, and be sued before probate. See Wentworth's Office of Executor, and Comyns's Dig. Adm. b. 9.

The Executor being appointed in special confidence transmits his power to his Executor, who however takes out letters of administration to the first testator, being entitled

where the persons legally entitled refused to act. Emancipated sons, and heirs disinherited by inofficious wills afforded instances of the former, and the want of a will, or its concealment frequently gave occasion to the latter; the grant might

the half, or brother of the whole, at ordinary's discretion.

IV. If the kindred refuse it may be granted to a principal creditor.

V. If an executor refuses or dies intestate, administration may be granted to a residuary legatee.

VI. In defect of all these, ordinary may chuse any discreet person. If administration be granted contrary to the statute it is not void but voidable. 1 P. Wms. 43. If administration be granted to the next of kin, the ordinary cannot revoke it without cause, and he may be compelled by mandamus to grant it to the person entitled. Comyns. Admn. b. 7.

Different kinds of Administration.—Besides the general administrator hitherto described, administration may be granted for special purposes, or for limited times, as *pendente lite, durante minore etate, durante absentia*.

To substantiate a suit in Equity, and make a decree perfect by having a personal representative before the court. it is often necessary to apply to the Ecclesiastical Court to grant administration to the nominee of the party, which was usually granted only for that special purpose

might be *decretal* and temporary, till it was known who had the real right of possession like that to an *administrator pen. lit*; or it might be *edictal*, when there was no occasion to hear parties judicially: the latter again might be *secundum tabulas*, where the heir instituted by strictness

purpose. Much mischief having arisen from such partial administrations, the Court of Prerogative now in compliance with the wishes of the Court of Chancery, (which indeed refused to attend to such administrations,) insists on such nominee taking administration generally.

The other species of administrations explain themselves, and are grantable to any proper person at the discretion of the ordinary, they not being within the statute. For the powers of these administrators see Walker and Woollaston, 2 P. Wms. 576.

Different effects of Probate and Administration, and of Administration granted wrongfully or by mistake.—Executor may grant, and release, and commence an action or suit in Equity before probate, but not maintain one. Administrator cannot commence an action before administration granted; Executor may also release or pay a debt, assent to a legacy, and be sued before probate. See Wentworth's Office of Executor, and Comyns's Dig. Adm. b. 9.

The Executor being appointed in special confidence transmits his power to his Executor, who however takes out letters of administration to the first testator, being entitled

ness of law could not act, (like an administration *cum testamento annexo*,) or *contra tabulas*, i. e. in contradiction to an inofficious will which had disinherited children without cause.

IX. COLLATIO BONORUM.] Where the goods were granted *contra tabulas*, if the person thus admitted by Prætorian Equity, had already received some preferment or provision, from the deceased, he was not to be admitted (124) into an

entitled so to do, but the administrator of the deceased, being merely the officer of the ordinary, and the administrator of deceased's executor having no privity with deceased, do not transmit their rights, and in such cases the appointment naturally devolves to the Ecclesiastical Court, who appoint a new administrator *de bonis non*.

Administration granted, if will afterwards appears, all acts done by the administrator are void, for administrator was not the representative of deceased: but if administration be granted to a wrong person, and afterwards repealed, all acts done by the first administrator are good.

(124) If one of several daughters has had an estate given with her in *frankmarriage* by her ancestor, (i. e. a species of estate tail, given by a relation for her advancement in marriage,) if lands descend from the same ancestor to her sisters in fee simple, she or her heirs,

an equal division, until he made an allowance for that part which he had received from testator while living. There was to be a general contribution, or collation of the goods, and the same rule held also in cases of intestacy (125).

heirs, shall have no share of them, until they bring the lands given in frankmarriage into hotchpot.

As to personal estate, the statute of distributions in Ireland, 7 W. 3. ch. 6. in its third section, ordains that no child of an intestate, except his heir at law, shall have a distributive share, if he has already received an advancement or money, equal to the distributive shares of the other children; and if the advancement be not equivalent, such child shall only receive so much as will make them all equal.

(125) To enter more into detail on executorships and administrations,—payment of debts, marshalling of assets, &c. &c. would be to comment not on the Roman Laws, but ours, *which latter I never meant to introduce except where points of comparison occurred.* I therefore *verbum nil amplius addam*, except to make the following miscellaneous observations, that all assets being by the Civil Law equitable, and no distinction of real estates, from personal, it had no occasion for any method similar to that so celebrated among us, of making all the assets equitable and all creditors come in *pari passu*, by *devising real estates for payment of debts.* That the general rule of the Civil Law, that none could die partly testate,

In all cases therefore whatsoever, the person previously advanced was obliged to a contribution, or *collatio*, before he could share.

testate, partly intestate, which is unknown to us, was sometimes relaxed among them, even in cases of unprivileged persons, viz. by matter *ex post facto*, as if a son succeeded in an action for an inofficious will against one heir, and failed against another. See Dig. 5. 2. 15. That an administration obtained in a foreign country, as at Paris, is not taken notice of in our courts, 3 P. Wms. 371. That in Holland, a testament is valid without any distinction between moveable and immoveable estate, or between chattels and lands, if made before seven witnesses, according to the Roman solemnities, but it was generally made there before two echevins and a secretary, or before a notary and two witnesses, men not women. See Corvin. Enchiridion. Lib. 2. tit. 11. and that in France, formerly (for who can now pretend to say what the ever varying laws of that country may be at a given moment) as well as in Spain and the Empire, testaments made before a notary and two witnesses were good and valid, tho' the testator and witnesses neither sealed nor subscribed, according to *Groenweg. de Legibus Abrogatis*, a work whose subject is most curious and interesting; but which I am forced to quote at second hand, not having been able to get it in this kingdom.

Lecture the Eleventh.

OF TITLE BY CONTRACT.

SIR William Blackstone says, that amongst us almost all the rights of personal property in a great measure depend upon contracts of one kind or other, or at least may be reduced under some of them: He at the same time observes, that it is the method taken by the Civil Law, which (says he) has referred the greatest part of the duties and rights of which it treats, to the head of obligations *ex contractu*, and *quasi ex contractu* (1).

My anxiety to render the Civil Law familiar to the Common Lawyer, has induced me to depart from this method of the Civilians, and to anticipate some of the subjects which Justinian considered under the head of contracts, particularly leases and mortgages, which I shall

(1) 2 Black. Comm. 442.

here again however notice, in their proper place (to speak as a Civilian,) among contracts, in the light in which they are viewed by the Roman jurists.

Obligations, agreements, contracts and covenants are often used as synonymous words, (2) and where they are distinguished, the distinctions are not uniformly agreed to, nor accurately observed. Perhaps the most usual distinction is, that contract is distinguished from obligation by being applied to (3) two persons, whereas obligation may apply to one only; and from covenant, as it relates to a thing present, covenant to a thing future (4). Yet Mr. Wood says, that a contract may affect one person only, and instances *mutuum*

(2) Bacon's Abr. 526.

(3) A contract is an agreement,—a mutual convention or bargain—there must be two *contracting* parties, 2 Black. Comm. 442. the particle *con* in the composition implies it.

(4) The debtor is obliged, not so the creditor; *present* sale is a contract, an agreement that a man *will* pay rent is a covenant. Blackstone distinguishes contracts into *executed*, and *executory*, the former differing nothing from grants, and distinguished from mere gifts, by being upon consideration.

and

and *stipulation* as contracts where one party only is under an obligation, and where an action lies but on one side, and Mr. Woodeson asks why may not a covenant relate to the past and the present, as well as the future (5).

This nicety of distinction, however, not seeming to be absolutely necessary in the common course of life, I shall proceed without further insisting on it, to delineate the order of the Roman Law upon the subject of obligations and contracts, which is most remarkably clear and methodical (6).

Obligation, says the Roman lawgiver, is *juris vinculum quo necessitate adstringemur alicujus rei solvendæ secundum nostræ civitatis jura*. The word *solvendæ* narrows the definition too much, and therefore legal writers interpret the necessity

(5) Wood, p. 165. Woodeson, Lec. 45. vol. 3. p. 85. Wood is not consistent, for he makes covenant to differ from obligation, as always affecting two persons, and makes contract a species or subdivision of covenant, viz. that in which there is a consideration, yet afterwards says, contracts may affect one only.

(6) No man can read the classification of contracts in Justinian's Institutes, without admiring the perspicuous and beautiful arrangement.

in general terms, *that of giving or doing something* (7).

Obligations were divided into natural, civil or mixed, and sometimes into civil and *prætorian*

Obligations might arise from a lawful or unlawful act, in reality or by fiction of law, and therefore were of four species.

Ex Contractu.

Quæri ex Contractu.

Ex Delicto.

Quæri ex Delicto.

FIRST, OF OBLIGATIONS, EX CONTRACTU.

Contracts were either nominate or innominate (8). Nominated contracts were such as had particular forms of actions assigned to them (9), from their frequency and general intelligibility.

They were Ex re—Ex verbis—Ex literis—Ex consensu.

Real. Verbal. Literal. Consensual.

Those Ex re,
were subdivided

<i>into</i> Mutuum,	<i>Loan for consumption.</i>
Commodatum,	<i>Loan for use.</i>
Depositum,	<i>Deposit.</i>
Pignus,	<i>Pledge.</i>

(7) Otherwise innominate contracts would be excluded.

(8) There was another division of contracts into *bonæ fidei* & *stricti juris*.

(9) See Powel on Contracts, 1 vol. p. 335.

Ex

Ex verbis,

into Stipulationes,

Stipulations.

Fidejussoriæ cautiones,

Sureties.

Ex literis,

admitted no subdivision.

Ex consensu.

Emptio & venditio,

Sale.

Locatio & conductio,

Hire.

Societas,

Partnership.

Mandatum,

Commission.

Innominate contracts called also pacts, were such as being more rare, and not of the same defined and certain nature, the law had not provided any express or peculiar form of action to enforce, but had left them open to such suit as was best adapted to the occasion, which was called an action in *prescribed terms*, and seems to have been analogous to our action on the case, as distinguished from an action of debt, *detinue*, &c. &c. (10).

Innominate contracts were usually ranked under four classes, expressive of the consideration, on which they were founded *and which was never*

(10) Such actions in prescribed terms were not distinguished by any specific names, but delineated by circuitry and periphrasis. See *Pandects*, 19. 5. 5. *Powel on Contracts*, 1 vol. p. 335.

pecuniary

pecuniary. 1 *Do ut des.* 2 *Do ut facias.* 3 *Facio ut des.* 4 *Facio ut facias.*

Quasi contracts were implied obligations which supposed a previous agreement. Of all these species of contracts in their order.

OF NOMINATE CONTRACTS, AND FIRST OF CONTRACTS, EX RE.

Real contracts were those in which, besides the consent of the parties, the delivery of something was required to perfect the obligation. They were four in number. 1 *Mutuum.* 2 *Commodatum.* 3 *Depositum.* 4 *Pignus.*

Mutuum.]—Was the loan of consumable goods, of money, wine, corn, and other things that might be valued by number, weight and measure, and were to be restored only in equal value and quantity, and not the same specific and identical things. The absolute property was transferred to the borrower, *i. e.* they were lent for consumption, but he was answerable for their value, and therefore must bear the loss if they were destroyed by wreck, pillage, fire, or other inevitable misfortune (11).

Tho'

(11) See Jones on Bailments, p. 49. *Mutuum* is not classed with bailments, because the identical thing was not to be restored to the owner, but another thing

Tho' the specific thing was not to be restored, yet something must be restored of the same nature, as well as of the same quantity and value; wine could not be returned for oil, or corn for wine: if it was, it was not a *mutuum*, but an exchange—not a nominate, but an innominate contract. To illustrate this contract still further, living animals could not be the object of a *mutuum*, because equal numbers might be of different value. The *mutuum* is a contract of borrowing; it is intrinsic in its nature, that it should be gratuitous without price or reward; if they followed, it would be changed into another contract that of hiring; yet by special agreement there might be interest on it, but that was foreign to its nature, and did not spring from it. But its nature will be still better understood by the description of enumeration, viz. *Commodatum*.

Commodatum.]—The *mutuum* and *commodatum* were both contracts of borrowing, both of

thing of the same quantity, nature and value. Sir. W. Jones' definition of bailments being a delivery of goods on condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions as soon as the purpose of the bailment be answered.

them

them supposed to be done to oblige the friend or neighbour, and conveying or containing no idea of price or reward in their own nature, tho' they might by special agreement; but herein they differed: The thing commodated was to be returned in specie, not merely in quantity and value, the very specific thing was to be returned—it therefore must be something that did not consume in the use. Thus a horse was a proper subject of commodation; corn, wine or oil of mutuation. *Mutuum* was loan for consumption; *Commodatum* loan for use: in the former the property of the individual thing was changed, tho' its value was returned; in the other the same person remained owner, tho' the use was alienated for a time (12).

(12) The Latin language very happily expresses the fundamental difference between *Commodatum* and *Mutuum* which the poverty of ours confounds under the vague appellation of loan; in the former the borrower was obliged to restore the same individual thing with which he had been *accommodated*, for the temporary supply of his wants; in the latter it was destined for his use and consumption, and he discharged this *mutual* engagement by substituting the same specific value, according to a just estimation of number, weight and measure. Gibbon, vol. 4. p. 331. octavo.

The

Lect.

Th
Dige
this
which
and fr
a cert
from a
obliga
extrac
action
the le
borrov
or if
pired:
subje
lent t
it was
beyon
fary c
lent, a
or clai
And
nefit o
(13)
(14)
villam a
neberis.
(15)

The sixth title of the thirteenth book of the Digests should be read upon this subject: altho' this contract was a grant without reward by which it was distinguished from letting to hire and from innominate contracts, and was also for a certain time, (by which it was distinguished from a precarium, or grant at will) it induced obligations upon the lender which may appear extraordinary, such as making him liable to an action, if the thing lent had defects known to the lender which injured the property of the borrower, as for instance a corrupted vessel (13); or if he recalled the loan before the term expired: And on the other hand the borrower was subject to damages if he employed the thing lent to any use but that specific one for which it was borrowed (14) and to interest if he kept it beyond the time limited. He must bear all necessary charges arising from the use of the thing lent, and could not detain it under a pretence or claim of debt (15).

And as this contract was entirely for the benefit of the borrower, he was answerable for the

(13) D. 13. b. 18. 2.

(14) D. 13. 6. 7. Si tibi equum commodavero ut ad villam adduceres, tu ad bellum duxeris, commodati tenaberis.

(15) Code, 4. 4. 23. 4.

flightest neglect; if the loss was occasioned by extraordinary accident he was excused, but to expose the *commodated* property of another to the perils of a journey or a voyage, made him evidently answerable for the voluntary risque (16).

Depositum.]—Was a contract by which a thing was committed to the custody of another, to be kept without reward, and returned on demand. In the two last contracts the interest of the receiver was regarded principally, in this only the

(16) Inst. 3. 15. 2. *Propter majorem vim, majoresve casus, non tenetur, si modo non ipsius culpa is casus intervenerit, altoqui, si id, quod tibi commodatum est domi, peregre tecum ferre malueris, et vel incurfu hostium prædonumvi, vel naufragio, amiseris, dubium non est, quin de restituenda ea retenearis*; Puffendorf in vain endeavours to argue the contrary. Sir Wm. Jones has shewn in his essay on bailments, that the principles of our law on this head are the same: *Commodatum* is one of the five species of bailments by him acknowledged; the others are *depositum*, *pignori acceptum*, *locatio* and *mandatum*. With each of these heads therefore the student should read the correspondent parts of that work of elegance, written by that prodigy of parts and information Sir W. Jones, attending particularly to the great question of responsibility for neglect, on which Mr. Justice Blackstone has said little or nothing.

advantage

advan
depos
tion
fraud
mishec
If the
der lo
forme
for re
If acq
was a
deposi
gros
confer
tended
ordina

(17)

(18)

(19)

(who co
bailmen
omission
takes of
which c
soever,
sion of
sons us
lewis, le

advantage of the person depositing: the thing deposited was not to be used, another distinction from *mutuated* or *commodated* property; fraud and unfaithfulness in the bailee were punished by an obligation to restore two fold (17). If the thing was deposited in a cabinet, and under lock and key, without depositary's being informed of the contents, he was only answerable for return of the cabinet back as he received it. If acquainted with the particulars contained, he was answerable for every particular (18). The depositary was answerable only for fraud, but gross negligence would be construed fraud; the conservation (19) of the thing being rather intended as a burthen than a benefit to him, only ordinary care was required from him, but a depositary

(17) Dig. 16. 3. 1. 1.

(18) Dig. 16. 3. 1. 41.

(19) Our law agrees, according to Sir W. Jones, (who confutes Lord Coke on this subject,) in his essay on bailments, where he divides neglect into *ordinary*, *i. e.* the omission of the common care which a prudent man takes of his own concerns; *gross*, the want of that care which every man of common sense, how inattentive soever, takes of his own concerns, and *slight* the omission of that diligence, which very circumspect persons use. The Civilians distinguished *culpa* into *lata*, *levis*, *levissima*.

depository might, by special agreement, make himself more responsible: so he might by a spontaneous officious offer, for thereby he may prevent their being deposited with a person of more vigilance.

The depository was not to use the thing deposited, Inst. 4. 1. 6. he had not even a limited property in it, as our depository has; his possession was considered the possession of the person depositing. I suppose, however, that common reason must have dictated an allowance to him to use the thing in a qualified manner, if it must have been injured by total non-use, as an animal, (a sporting dog for instance) for want of exercise and practice; but clothes were not to be worn; quære as to books.

Under

Sir W. Jones observes, that it has been said, that *culpa* by the *barrenness of the Latin language*, includes as a generic term, various degrees or shades of fault, which are sometimes distinguished by epithets, and sometimes left without distinction; and that the divisions of neglect are rather to be looked for in the Greek translations, *a language rich and flexible*, and having terms expressive of every shade: But he is of opinion that the Greek jurists were not perfectly acquainted with the niceties of their own language. With respect to the depository, he

is

Under deposits the Civil Law considers deposits *pendente lite*, and gaming deposits; the former it terms *sequestrations*; *apud sequestrum deponitur cum aliqua res in controversiam deducitur* (20). Playing for money, and depositing the stake, was allowable, where the game was of a noble kind, such as a trial of strength or agility in the Course or the Palæstra, but if the wager or bet regarded not some exercise honored by public estimation and useful in the school of war, gaming was disallowed and all securities for the same avoided, or if the money was paid it was recoverable again, with one exception of allowance to the higher orders, to play for small sums. *Ad singulos congressus unum numisma seu solidum deponere.* Code, lib. 3. tit. 43.

Pignus.]—As the Civil Law did not distinguish (in delivering its rules and principles) between mortgages of land and mortgages of goods, and considered both under the head of Contract; in

is even of opinion, that if he be a careless man, and his character known to the depositor, and he takes no better care of *his own* goods, that he is not responsible even for gross neglect.

(20) D. 16. 3. 17. The sequester like a receiver, or administrator, pen. lit. was to preserve the thing safe, to sell perishable goods, and to allow the party aliment, and sometimes costs to carry on the suit.

varying

varying from that order, and considering the former under estates upon condition, I have necessarily exhausted most of the material regulations applicable also to the latter: such as redemption, priority, &c. &c. As our law, however, clearly makes the distinction, calling the latter pledges or pawns: I will not pass them unnoticed in the spot assigned to both by the Civil Law, but shall confine myself chiefly to the degree of care required from the pawnee, and the extent of his power as to using the pledge.

The *Mutuum* and *Commodatum* were for the sake of the receiver only, and the *Depositum* for custody and advantage merely of the person depositing, but the *Pignus* or Pledge was for the advantage both of creditor and debtor; from the pawnee therefore ordinary care was required in the keeping of the pledge (21), something more than that usually exercised by men in general about their private affairs, whatever may be the caution of certain more prudent individuals. If therefore the pledge was stolen, not only the debt was dissolved, but the pawnee was also answerable in damages: but if it was

(21) Sir W. Jones again proves this to be the rule of our law in opposition to Lord Coke.

taken

Lect

taken
ditor
able t
stipul
the p

Th

was a
was n
benefi
duce
in im
not m
time,
The p
if it di
the va
for the
the pa
tor in

(22)

pignora,
ra latron
submovet
orum l
of mod

(23)

taken by violence, as by open robbery, the creditor did not lose his debt, nor was he answerable for the value, unless it had been expressly stipulated between the parties, that the loss of the pledge should dissolve the debt (22).

The Pawnee might use the goods, if the using was attended with no prejudice, or rather if it was necessary, as the milking of a cow, but the benefit or value of the milk, or such like produce of the user, resulted to the pawner (23). As in immoveables so in moveables, if payment was not made of the principal debt within a certain time, the creditor might alienate and sell the same. The person was not discharged by the pledge given if it did not answer the debt; if the debt exceeded the value of the pawn an action might be brought for the remainder; and if the pledge was evicted the pawnee became personally liable to the creditor in damages.

CONTRACTS

(22) Code, lib. 4. tit. 24. *de pignoratitia actione*. *Creditor pignora, quæ fortuitis casibus interciderint (in quibus aggressura latronum) præstare non compellitur, nec a petitione debiti submovetur, nisi inter contrahentes placuerit, ut amissio pignorum liberet debitorem*. Sir W. Jones shews the usage of modern Constantinople to be the same.

(23) If pawnee lose goods without any default in him,
it

CONTRACTS EX VERBIS.

Stipulations.]—These were solemn promises confirmed by certain solemn and set form of words, by question and answer, such as *spondes ? spondeo ; promittis ? promitto*. If the promiser to *promittis* had answered *spondeo* it would have been invalid ; they conveyed the idea of a firm and irrevocable contract, and their object was to sustain the validity of a gratuitous promise, or promise without consideration, which for that very reason required the most cautious and deliberate consent. The questioner was the stipulator or creditor, the promiser was the debtor, and thus it was that in this one case the rule of the Civil Law *ex nudo pacto non oritur actio*, seems to be infringed, or to speak more properly, where the contract was made by this solemn form of words, it was not a *nudum pactum*, altho' without consideration (24).

Under

it shall be the loss of the owner, but if using be no prejudice to the goods he may use them, Salk. 522. The instance of milk is put, Owen, 124. but by our law the milk or produce as calves, &c. &c. would belong to the pawnee.

(24) *Ex nudo pacto non oritur actio* is the rule of the Civil Law, as well as of ours ; but the meaning of *nudum*

Under this head of stipulation much useful information respecting contracts in general, is to be collected from the Civil Law (25); every stipulation was to be performed simply, or at a day certain, the day was added for the sake of the promiser not of the stipulator, the whole day therefore was allowed him for payment (26).

A grant nominally for life, as of an annuity, was construed by metaphysical subtilty to be per-

dum pactum is very different in the two laws, with us it means any pact not supported by consideration, with them it meant a verbal pact, neither supported by consideration nor conveyed in solemn technical form of words. Writing therefore, or solemn form of words, cured the want of consideration with them, not so with us, yet Lord Mansfield and Mr. J. Wilmot, in the case of *Van Miesop v. Hopkins*, 3 Burr. seem much inclined to think that the *rationale* of our law is the same, tho' a mistaken practice has construed it otherwise.

(25) As with us, rent is not due till the last moment of the day.

(26) This very odd rule arose from this subtilty, much more resembling the scholastic spinosity of the middle ages than the strong good sense of ancient Rome; *naturalia non possunt tollere civilia, tempus est naturale, obligatio civile quiddam, ergo tempus non est modus tollendæ obligationis*: but the heir got rid of the annuity by a supposed and imaginary release from the stipulator.

petual, and yet this ridiculous rigour was rendered null by the aid of fiction. If place or time were added for the sake of the creditor, he was not obliged to accept payment but at the place or time agreed (27); every thing which could be made the subject of property might be the subject of stipulation; but madmen, deaf and dumb, prodigals and minors, could not enter into this contract; a man could not promise for the Act of another, except under a penalty, but he might promise that he would *cause* another to do a certain thing. If an impossible condition was added to the obligation it was null, and a simple obligation arose, the performance of which might be instantly demanded (28).

A contract by stipulation to be executed after the deaths of the parties, (before the time of Justinian) was not valid: because an obligation could not begin from the heir, nor could a man bind his heir without binding himself, from their imaginary unity.

Under the title of stipulations the Civil Law

(27) Dig. 41. 1. 12. 2.

(28) Our law distinguishes between conditions precedent and subsequent, and between conditions possible and impossible at the time of the making: So, if the undertaker neglected to weigh his own strength, or alone knew the impossibility, he is answerable in damages.

has

has also treated of contracts contrary to good morals or sound policy, which are all thereby avoided (29).

It must be noted that the forms of stipulation were abolished by the Leontine Constitutions, and that long before Prætorian relaxation and legal ingenuity were combined to put all equitable agreements upon as firm and solid a ground. These stipulations had been four-fold, *Judicial*, as when security was ordered to be given against fraud; *Prætorian*, as when security was demanded *de damno infecto*; *Conventional*, by the agreement of the parties; and *Common*, for the security of a minor.

Sureties.]—Others frequently bound themselves for the man who promised, and these sureties were called *Fide Jussores*. They might be received in all obligations whatsoever, and

(29) *Pacta quæ contra leges, constitutionesque, vel contra bonos mores nullam vim habere, indubitati juris est.* Code, lib. 2. tit. 3. 6.

Quod turpi ex causa promissum est non valet. Inst. lib. 3. 20. 23. but suppose the money paid, *ubi & dantis & accipientis turpitudine versatur repeti non potest, ubi solius accipientis potest; sed quod meretrici datur, repeti non potest, non enim turpiter accipit*; a strange position. See Dig. lib. 12. tit. 51.

How far a particeps criminis would be relieved, see Dig. lib. 12. tit. 51. l. 3. 4.

they

they bound not only themselves but their heirs, even without exprefs mention (30); such was the case, fays Wood, in all contracts, whether proper or improper, and all the fureties were bound feverally, altho' not fo exprefsly fpecified. The Fide Juffor had the advantages called *beneficium ordinis*, by which he could force the creditor firft to fue the principal, and *beneficium cedendarum actionum*, that of obliging the creditor to affign to him on being paid, to enable him to fue a fellow furety. Minors could not be fureties nor foldiers (31); nor women by the *fenatus confultum Velleianum*.

Surety might pay before action brought (32); if furety was in peril he might fue before term of payment, to be indemnified or difcharged (33);

(30) Not fo with us as to the heir, but the executor is bound without exprefs mention.

The fecurities taken in the Court of Admiralty in the nature of bail, are ftipulations and fide juffory cautions, and fo called. A prohibition would go if that court took a recognizance, it not being a court of record; there were great contefts on this fubject formerly. See Zouch, Godolphin, and 2 Lord Raymond, 1285. Thefe ftipulations have no priority before fpecialty debts, nor do they affect lands.

(31) See Code 4. 65. 31.

(32) Dig. 17. 1. 10. 11.

(33) Dig. 17. 1. 38. 1.

if

if no personal security could be had, creditor might have a juratory caution from his debtor.

CONTRACTS EX LITERIS.

The contract by writing was called *litterarum obligatio*; these written contracts stopped the mouth of the contractor from denying his debt or obligation, even supposing he had not received that which he thereby acknowledged to have been to him paid or delivered (34): within two years however, the debtor was not barred from pleading that the money was never paid, or goods delivered, and throwing the proof upon the creditor.

A stipulation, after being made in solemn form of words, might be reduced to writing.

CONTRACTS BY CONSENT (35).

Consent *alone*, (without any thing delivered as in contracts *ex re*, or solemn form of words

as

(34) As with us, want of consideration cannot be averred by the obligor of a bond against the obligee, nor by the maker of a note against the indorsee.

(35) The wide and various subject of contracts by consent is spread over four books, (from 17th to 20th) of the Pandects, and is one of the parts best deserving

as in contracts *ex verbis*, or writing as in contracts *ex literis*) may make a perfect contract (36). It is divided into four branches, 1 *Emptio & venditio*, the contract of sale. 2 *Locatio & conductio*, the contract of hiring and letting to hire. 3 *Societas* or partnership. 4 *Mandatum* or commission.

Contract of Sale.]—By the Civil Law all contracts of sale were good without writing, to whatever value they extended (37). The Institutes begin their precepts on this contract,

ing the attention of the English student. Gibbon, vol. 4. p. 330. octavo.

(36) This does not mean consent without *consideration*, but consent without the requisites mentioned in the preceding species of contracts. This contract might be made between persons tho' absent by letter or thro' intervention of others: Stipulations required the presence of both parties.

(37) Our statute of frauds has made the law with us very different; it enacts that no contract for the sale of goods, wares, or merchandises, for the price of 10*l.* and upwards, shall be good, except the buyer shall accept and actually receive part of the goods so sold, or give earnest to bind the bargain or in part payment, or unless some note or memorandum in writing be made and signed by the parties, or their lawful agents.

by

by declaring that it is perfect as soon as the price of the thing is agreed upon (38); and there not only ought to be a price, but a *certain* price, which Justinian ordained should be considered as containing sufficient certainty, if the agreement was, that the thing should be sold at a price to be fixed by a third person; if the price was fixed, the buyer might have the action *ex empto* against the seller for delivery of the goods, the seller an action *ex vendito* for the price tho' no writing or earnest (39); not so if no price was fixed, and therefore the Institutes say, 3. 24. 1. at the end of the section *de emptione pura*, &c. &c. *Nulla emptio*

(38) Read upon this whole contract the twenty-fourth title of the third book of the Institutes *passim*; the title is, *De emptione & venditione*.

(39) Besides the actions *ex empto* & *vendito*, there were four *Prætorian* actions applicable to this contract; *Redhibitory* to compel seller who did not discover faults in the subject matter to the buyer, to take the goods again, and for damages. *Quanto Minoris*, for reduction of price, when both ignorant of the fault. *On the case*, for *knavish* concealment. *Estimatory*, when the goods sold for more than their value, from false commendation or puffing; a sad restraint upon Roman auctioneers.

fine

sine pretio esse potest. But if the goods were delivered without price fixed, the price might be settled by testimony of their value, and in such case the smallest value was adopted.

But these rules respecting the perfection of this contract, were altered by Justinian when the contract was in writing; there was no obligation to put it in writing,—writing was not essential, but if insisted on by the caution or jealousy of the parties, it must be attended with certain solemnities to obtain the *fidem instrumentorum* (40). The instruments of sale were to be written by the contracting parties, or at least signed by them; and without these precautions, or if they were drawn by a public notary (*Tabellione*) if any the smallest formality was omitted, they might recede from their bargain with impunity, unless *arrha* or earnest had been given. Tho' earnest did not constitute the contract but served only as proof of it, and tho' without it as we have said the contract was complete, and rights of

(40) See Code, l. 4. tit. 21. *De fide instrumentorum* a title very worthy of perusal. C. 17. *Quas in scriptis fieri placuit non aliter vires habere sancimus nisi, &c. &c.*

action vested, yet it did subject the buyer if he receded from his bargain, to the loss of that earnest (41), and the seller to damages in double its value.

The Roman lawyers were much divided on the question, whether the price must always consist of money, or whether it might not be composed of other commodities,—in other words, whether *commutation* was or was not a species of contract separate from vendition. The Proculians and Sabinians, two great parties at the Roman Bar, (whose great ground of contest seems to have resembled one not unknown to modern times, viz. whether equit-

(41) Sir William Blackstone, represents our law as differing, and says the property is absolutely bound by the earnest, amongst us. Mr. Christian thinks otherwise (and quotes 1 Salk. 113.) so does Mr. Justice Buller. And undoubtedly they are right, if Mr. Blackstone meant that the property was transferred, which I do not conceive he could. Earnest has the same effect with us, which fixing the price had in the Civil Law: It binds the bargain, so that the vendee has a right to the delivery of the goods, on demand within a reasonable time. But both by the Civil Law and ours, the property is in the seller till delivery, *qui nondum rem emptori tradidit, adhuc ipse dominus est*, say the Institutes. Lib. 3. tit. 24. sec. 3.

able construction and Prætorian laxity should encroach in the legal forum on the rigid lines of strict law) espoused different sides of this agitated question. The distinction was considered by the Proculeians as important, because different rules were applicable to *sale* and to *exchange*, in determining for instance, *when* the property vested, and who should be liable to intervening loss between the contract and the delivery. Their opinion prevailed and received the sanction of the Imperial Court (42).

The Institutes in the next place treat of the risk or profit between the time of the contract made and delivery of the subject (43); the moment the price was fixed the risk rested on the buyer,

(42) Lawyers in all periods, have been ostentatious of displaying classic taste, tho' the rest of the world has not in general acknowledged much connection between Law and Belles Lettres. Even the grave Littleton, as Lord Coke says, *quoteth verses*; but perhaps none but the Roman lawyers ever quoted them as legal authorities. The Proculeians and Sabinians in the controversy mentioned above, appealed to Homer: and Justinian in his Institutes, and Paulus in the Pandects, have gravely introduced their quotations from the Iliad and the Odyssey.

(43) Institutes, lib. 3. tit. 24. sec. 3. *de periculo et commodo rei venditæ.*

and

and he became liable to all accidents, which happened without the fraud or fault of the feller, unless the feller especially took the risk upon himself, or unless the loss was occasioned by his improper delay of delivery (44). The feller in his turn was obliged to assign over all rights of action existing in him to the buyer, to compensate his risk and aid his claims.

Inadequacy of price was no cause for annulling the contract, (as it is in our Courts if the bargain be plainly iniquitous,) but the Civil Law with respect to immoveables at least, fixed the term of that inadequacy which should defeat the contract, viz. half the real value. Circumvention therefore in all cases at least to half the value it seems to have allowed, (*mirabile dictu,*) whereas our law, and the law of reason, would consider the nature of the transaction, and not authenticate partial fraud; but on the other hand it demands a manifest pre-

(44) I should recommend to the student to compare here, with the tenets of the Civil Law, the cases collected by Mr. Justice Buller, in treating of the action of Trover. Such as *Colston* and *Woolston*, &c. &c. The buyer with us appears not to be liable to the risk, until he actually gets possession, or the goods be delivered to a carrier or conveyance chosen by himself.

ference to our system, in obliging the seller not only to warrant the title, but to warrant the goodness of the commodity. He was obliged, if he wished his bargain to stand, to explain every fault within his knowledge (45) to the buyer, or else there was an *implied* warranty of their good quality; whereas with us the maxim is *Caveat Emptor*, and if the seller does not disguise, or misrepresent, his silence does not make him responsible; he must *expressly* warrant to subject himself to responsibility (46).

The seller seems to have had an advantage, not given by our laws, that of interest on the payment if delayed (47), and on the other hand the buyer was privileged in being entitled to damages for eviction, even tho' the sale was in market overt (48).

(45) Dig. lib. 21. tit. 1. c. 1. f. 1.

(46) It is very extraordinary that these codes should have each of them adopted in its turn maxims seemingly the most inequitable; with respect to one article, viz. *horses*, it seems to be now agreed that with us a found price implies found goods; in the name of reason why should not the maxim be universal?

(47) It has been proposed to make shop debts bear interest.

(48) D. 18. 6. 19.

Some

Some special covenants usual at Rome deserve notice ; it was sometimes covenanted that at any time before a certain fixed day the seller might contract with any other person who would offer a better price, which covenant was called *addictio in diem* ; or that if the price was not paid before a certain day the bargain should be void, an agreement called *pactum commissorium* ; or that the seller should have a preference in repurchase, if the buyer grew tired of his bargain, a reservation called *jus retractus* (49).

Some regulations also of a political nature respecting this contract are worthy of attention : Monopolies were strictly prohibited, the farmer was sometimes obliged to bring his corn to market, the price of commodities might be fixed by the magistrate, and combinations to enhance the price of work were punished with severity, ordinances not neglected by our statute law (50).

It

(49) D. 18. tit. 2. 3. and 5.

(50) With the price of commodities our laws however have meddled very sparingly, nor am I so little acquainted with writers on political œconomy, not to be attached to those who condemn forcing by bounties, or curbing by prohibitions ; yet tho' the doctrine in general may be true, that the market should always be left
to

It is under this head that the Civil Law considers those restraints on purchase, which in compliance with the mode of our law I arranged under Title by Alienation. Thus the prohibition as to things sacred and public, to estates under substitution or entail, to the *fundus dotalis*, and as to alien purchasers, are enumerated under this contract in the Pandects and Code; and the conveying (51) of arms and contraband

to find its own level, yet I will not say that they are never to bow to circumstances; I will not say, that when a neighbouring nation fixed an ultimatum to the price of provisions, they might not have been for the moment wise; nor would I venture to pronounce that a temporary legal restraint or ultimatum to the price of lands in this kingdom, viz. that it should never exceed a certain proportion of the profits of the ground, and thereby give to the terretenant the encouragement which political economy requires, would be altogether a wild idea. But perhaps it is too adventurous for laws to meddle with that which time and reason, and the real interest of the head landlord will probably cure, unless the ignorant impatience of the tenant prevent it.

(51) Dig. 18. 1. 34. 1 & 2.

Code 4. 51. 7. Holland in the excess of commercial avidity, while it embraced with eagerness most of the provisions of the Roman Law, rejected this, and the Dutch at the siege of their own towns, have *legally* supplied the enemy with ammunition. Groenweg. de legibus abrogatis.

goods

goods to enemies is also specially prohibited in the latter.

Tho' the Civil Law was minute in its regulations of trade, it did not pay honor to the commercial system as appears from Code lib. 4. tit. 63. *de commerciis et mercatoribus*. In its 3d section it is said, *nobiliores natalibus et honorum luce conspicuos, et patrimonio ditiores, mercimonium exercere prohibemus, ut inter plebeios et negotiatores facilius sit emendi vendendive commercium*. Unless perhaps it be said that this was to prevent the smaller traders from being overpowered. A comparison between the contract of exchange and the contract of sale, will elucidate the meaning of contract by consent in the Roman Law. Exchange was not perfected by *bare consent*, actual permutation must take place before the contract was perfect, from an agreement to exchange no action arose, nor could the risk be transferred from one to another before actual permutation, so that the distinction between these contracts was far from being nominal.

Under the head of exchange (52) or commutation Woodrags in money exchange and banking.

(52) Ayliffe seems to conceive that a transaction mentioned Dig. 14. b. 16. resembled a sons' drawing a bill upon his father.

Bankers

Bankers there were at Rome called *Nummularii et Argentarii*, but how far they resembled modern bankers it would not be easy to ascertain. They seem to have been also notary's public, and with them mortgages and other transfers of property were registered. As to bills of exchange they are generally held to be of modern invention, and Mr. Blackstone traces the origin of paper credit to China about the 13th century; *cambium* exchange comes from an obsolete word *cambio permuto*.

Contract of hiring.—The Civil Law always affecting extreme accuracy in treating of contracts, labours to draw exact limits between the contract of hiring and the contract of sale: the boundary may be sometimes nice and the distinction necessary; they agree in this that as the former contract is complete by settling the *price*, so is the latter by fixing the *hire*; and the hirer or *conductor* is immediately entitled to his action *conducti*, as the *locator* or letter to hire is to his *actio locati*. They agree also in not requiring any solemn form of words, in the contract being reciprocal, and in the price or hire not being payable if eviction *in limine*: they differ in this, that in bargain and sale the contingent hazard falls on the buyer; in hiring and letting to hire on the letter,

letter or *locator*, unless the contrary be agreed on, or the hirer be in fault.

Hiring might be either hiring of property, as of land or cattle, or hiring of labour or skill; of the labour of a workman or skill of a physician: of the hire of immoveable property we have treated under the head of leases; of the hire of moveables I shall here treat as far as respects the care and diligence required in the hirer. The diligence and care to be used according to Sir W. Jones, was ordinary diligence, such as a prudent man would use about his own property. If a horse was hired, it was to be rode and used as a man of common discretion would use his own horse. If furniture was to be hired, no damage was to be reimbursed but what arose from the want of ordinary care either in the hirer or his servants (53), and for the last the master was not always answerable. But for the minutiae of this learning I must refer the reader to the 2d title of the 19th book of the Digests, *locati conducti*, and particularly to the eleventh section which begins

(53) Here again Sir W. Jones has shewn not only that this was the doctrine of the Civil Law notwithstanding some mistaken passages, but that our law agrees, and that both agree with the laws of the wisest nations, even of the Persians, Turks, &c.

Videamus an et servorum culpam præstare conductor debeat and instances in cases of fire, &c.

The hire of labour *locatio operis* is by Sir W. Jones divided into two branches, *faciendi et mercium vehendarum*: Thro' them both Sir W. Jones insists that the same principle prevails; that ordinary and not the most exact care and diligence is requisite. Thus the inn-keeper repels the presumption of knavery or default by proving that he took ordinary care, or that the force which occasioned damage to the goods was irresistible, tho' he is liable *prima facie* for all goods of his guest stolen or lost by the negligence of him or his servants; and the carrier for hire, (tho' his being made liable for the value in case he be robbed seems to be a contradiction to the rule as, that seems to be inevitable accident,) has been laboriously argued by the same learned author to be within the same rule; for, says he, this is only an exception introduced by the great maxims of policy and good government, least confederacies should be formed between carriers and banditti; so that the loss is not considered as being of necessity or always owing to inevitable accident (54).

Thus

(54) Sir W. Jones thinks that in the rule concerning a common carrier, viz. that nothing can excuse him but

the

Thus far I have implicitly followed Sir W. Jones, but delightful as his attempt to harmonize the opinions of all civilized nations on the subject of bailment is, some may be startled by its application to the labour and skill of men in the learned professions; to say that from the lawyer or the physician (55) ordinary care and diligence

the act of God or of the king's enemies, in the place of the first exception, it would be more proper as well as more decent to substitute inevitable accident.

(55) Gentlemen of these faculties, tho' they might be expected to be termed *locatores*, in speaking of this contract are called *conductores*, i. e. they were considered as hirers of the work to be done, *operis faciendi*, tho' in their turn they *located* or hired out their pains and skill. The Roman Law tho' it brought the labour of these professions under the head of this contract, was anxious to distinguish that of the lawyer by saying it was not *merces*, but *honorarium quiddam* not *price* but *reward*; a distinction much more justly claimed by the modern lawyer, who cannot bring an action for his fees: for Antoninus Pius ordained *Juris studiosos, qui salaria petebant hac exigere posse*, Dig. lib. 50. tit. 13. In the same title is ascertained what shall be deemed the liberal arts, among which medicine is ranged, *medicorum eadem causa que professorum, nisi quod justior, cum hi salutis hominum illi studiorum curam agant*. The contempt for these professions in France did not originate with the Civil Law.

only are requisite, and that they are not responsible for deficiency in the most exact attention to the affairs of the client or disease of the patient, or at least that the omissions for which they could *veniam dare* to themselves, they would have a claim *vicissim petere* from others, may not be perfectly reconcileable to common opinion. A surgeon has been made liable in damages for deviation from common practice and an attorney for omissions seemingly pardonable.

I believe however, it will be found that his principle well examined is right, and that nothing but the want of common ordinary reasonable diligence, could affect the pocket of the practitioner thro' the medium of a verdict,

It appears from Tacitus that in the reign of Claudius Cæsar, the Bar was dishonoured by astonishing perfidy after the receipt of immoderate donations; a great clamour was raised, and the enforcement of the Cincian Law loudly called for, by which it had been of old provided, *ne quis ob orandam causam pecuniam donumve accipiat*. It was complained *inimicitias, odia & injurias foveri, ut quomodo vis morborum prætia medentibus sic fori tabes pecuniam advocatis ferat*; the result was, that the Emperor fixed the highest fee of an advocate at *dena sestertia*, about 80*l.* 14*s.* of our money.

however

however it might thro' the medium of his character (56). Yet to support his general principle he has combated not only with a great modern opinion, but with that of one very celebrated in his time, the Roman Caius, who says, *Qualem diligentissimus Pater familias suis rebus adhibet*. This authority the ingenious Judge opposes by stating the energetic temper of Caius, (whom Justinian in his Institutes usually follows) who was fond of superlatives, while his meaning was much weaker than his words, a liberty which few would venture to take to change the words of an opinion, from knowledge of the impetuosity of its framer.

Under the contract of hiring, the consideration of *interest* is naturally introduced. The thirty-second title of the fourth book of the Code treats *de usuris*, in its 27th section, fixes the rates of interest demandable by va-

(56) In fact his principle does not differ from the common sentiment, for ordinary diligence in this case means a degree adequate to the performance of the undertaking. Lord Holt and Mr. J. Blackstone make no distinction between a *Commodatum* and a *Locatio*, in speaking of this contract. Inst. lib. 3. tit. 25. *Custodiam*, &c.

rious

rious persons. Great and illustrious persons could only demand four per cent. legalised traders might demand eight, but *pecunia trajectitia* or money lent on bottomry might bear *centesima usura* or twelve per cent. interest, which was the highest rate allowed at Rome (57). In ordinary cases, six per cent. was the legal rate, and to exceed this or make an usurious contract was severely punishable, positively by mulcts, negatively by incapacities. I have observed that a usurer could not even make a testament.

Mr. Gibbon says that Justinian does not deign to treat of interest in the Institutes. But in the Code and Pandects, many rules respecting it are given, among which two of

(57) Mr. Gibbon seems to agree with me in thinking that twelve per cent. was the highest interest allowed in any case in the times of the Emperors, Wood and others represent interest on bottomry as unlimited as the risk. The Roman method of computing interest has been perfectly explained by Mr. Blackstone in a note to Book 2. ch. 30. the principal was supposed to consist of one hundred parts, if the amount of one of these parts was paid monthly, it was *centesima usura*, or twelve per cent.

the

the most notable are that interest shall never exceed the principal, and that interest shall not be given upon interest. In the times of the Republic no interest could be demanded except by special agreement. The Emperors gave it on all contracts *bonæ fidei*, and also on legacies and trusts: interest was not esteemed by the Civil Law a natural produce but given only to recompence delay of payment, and if the cause were in its own nature unproductive, it was not given before demand in a Court of Justice (58).

Societas.]—

(58) So with us upon bonds no interest beyond the penalty, and interest not allowed upon interest, with some special exceptions. When the reader finds a title in the Digests, another in the Code, and a third in the Novel Constitutions, *de nautico fanore*, he might expect much information upon bottomry and insurance. But the titles are short and the information brief and general. They tell little more than that the creditor on bottomry shall on account of the risque be entitled to extraordinary interest, determine the commencement and duration of the risque, and illustrate the general doctrine by one or two examples. In modern commentators on the Civil Law, and not in the text of the Civil Law itself, we are to look for information on these

Societas.—Partnership with the Romans was either in some particular thing or subject, or in joint labour and its profit, or in goods advanced by one and labour or work by the other, or in the whole property of the parties; in the latter case, any new acquisition by inheritance or gift subsequent to the contract of partnership did not come into the common stock.

The view which the Institutes take of this subject (for they do not here treat of partnership in lands, which has been spoken of above in the chapter of Jointenancy.) is quadruple.

First, Of the shares of profits or loss.

Secondly, How partnerships were dissolved.

Thirdly, The diligence and care requisite in partners.

Fourthly, What actions lie ultimately between them.

these important subjects. From these, learned Judges and Lord Mansfield particularly derived much of that copious information which they have transferred into our law, which transference illustrated by reporters and by Molloy, Beawes, Wesket, Parke and Miller, may unless when very special cases arise save the trouble of much further search. However, within modern experience, causes have occurred, in which a search into the modern voluminous works of foreign commentators has repaid the pains.

If

If no express agreement had been made, the loss was to be equally born, and the profit equally divided, or rather in proportion to the shares advanced by each contributor. Much controversy had existed among the Roman Lawyers, whether a special agreement, that one partner should receive two-thirds of the profit and bear but a third or perhaps no part of the loss, should be valid; Mucius supported the negative, Sulpicius the affirmative: The opinion of the latter, supported by the reflection that the labour of the one may be as important as the money of the other, ultimately prevailed; if one partner gained by means of the common stock, the profit must be divided of course, but if any gain accrued or loss fell upon him in consequence of transactions unconnected with the partnership, he alone was concerned (59); each party was entitled out of the common stock to reasonable maintenance for his family, but to no allowance for expences occurred by gambling or other vices (60). Partnership was implied, if men lived together and acted as joint traders, or if a

(59) D. 17. 2. 59. 1.

(60) D. 17. 2. 52. 15. 10.

payment was made by one in the name of the partnership (61).

Partnership was dissolved by death of one of the partners, if there were ever so many; the partnership itself could not be made to descend on heirs (62), but the partnership covenants might; the profits passed to the heir, though the partnership did not (63). This contract was also dissolved by any one partner renouncing the society, but if he did this from a fraudulent motive, or secret view of screening his own property from fair debts, he was counteracted by the providence of the law.

Accomplishment of the purposes of a special and limited partnership, confiscation, insolvency, bankruptcy terminated this union; but covinous attempts to defeat creditors were op-

(61) With us, sale by one partner is sale by all; payment to one is payment to all; dealing with one generally in matters concerning their joint trade, charges all; but a Fi. Fa. against one for his separate debt, does not affect the partner.

(62) D. 17. 2. 59.

(63) With us, there is no survivorship among partners in trade and merchandise; if of two partners one dies, a creditor may charge the other with the whole.

posed

posed by ordinances not unlike our statutes to prevent fraudulent alienations (64).

The partner was obliged to observe only the same ordinary care and diligence in the affairs of the partnership (65), which he observed in keeping his own private property. Inst. lib. 3. tit. 26. sec. 9.

The action given to the partner was the action *pro socio*, which was direct on both sides (66); this action lay, if a partner had converted any part of the common stock to his own use (67), or received too great a dividend; so if he had sustained damage on account of the partnership, or laid out money on the common stock; (68) so he might recover against the heir of a partner for the fraud or negligence of the person so represented.

(64) In these countries, dissolution of the partnership publicly known, will prevent one from being affected by subsequent contracts made by the others, but does not invalidate previous demands against the joint stock.

(65) See Dig. lib. 42. tit. P. which is, *quæ in fraudem creditorum facta sunt ut restituantur*.

(66) By direct, was meant a legal in contradiction to an equitable suit, which latter was called *Utilis Actio*.

(67) Dig. 22. 1. 1. 1.

(68) Dig. 17. 2. 52. 4. and 17. 2. 38. 1.

3 M 2

Mandatum.]

Mandatum (69).]—This contract includes authorities, and the powers of factors and attornies where they acted gratuitously, and also bailments of property to be conveyed from place to place without reward (70); for it was essential to this contract, that it should be gratuitous since if the thing was done for reward, it became the contract of location and conduction; hence, Jones prefers the word mandate to commission, because commission generally includes hire.

The Civil Law distinguished mandates into those given for the sake of the mandator or mandatory or both, or of a stranger jointly with either or singly by himself; if the mandate was given simply for the sake of the mandatory, it

(69) See lib. 3. Inst. tit. 27.

(70) The celebrated case of *Coggs and Bernard*, was of a *mandatum*. The mandatory there undertook to carry brandy from one place to another, and in the carriage, he managed it so negligently, that one of the pipes was staved; it was decided that he was responsible, tho' the defendant resisted on the ground that he had not undertaken to carry it safely and securely, because this was implied as far as ordinary care, and thus, says Sir W. Jones, a case which the first elements of the Roman Law have so fully decided, that no court of judicature on the continent would suffer it to be debated, was thought in England to deserve very serious consideration. 2 Lord Raymond, 909.

was

was rather advice than contract, and not the subject of an action, unless it was fraudulently intended, and then the adviser was answerable.—

D. 50. 17. 47.

If the mandate was contrary to good morals it was not obligatory, as to commit theft or any other crime (71).

The mandatory was not to exceed the bounds of his commission or authority, but the commission need not be observed *ad unguem*, it was sufficient if the probable mind and intention of the mandator was pursued. The diligence required of him was ordinary diligence, adequate however to the performance he undertook, unless by special convention he undertook for more, or by voluntary offer had prevented another who might have been more diligent from being employed (72); inevitable accident therefore excused, or violence, such as force and robbery, unless the party had unnecessarily exposed himself to that danger (73).

A man-

(71) *Contra bonos mores* in the Canon Law, meant only acts *mala in se*, not *mala prohibita*. The Civil Law included both in this phrase.

(72) Coggs and Bernard. 2 Lord Raymond, 909.

(73) A. had undertaken as a friend to bring money from the country to town: On his arrival at night, in-

stead

A mandate became null by being revoked *dum res integra sit*, before any act had been done in consequence of it; so it did by the death of either party while it continued entire, unless the thing to be performed was to be done after mandator's death (74). Every one was at liberty to refuse such a commission, as he would refuse a deposit, but if he once undertook it, he must either perform it or renounce as soon as possible; for if he failed in his promise, or his renunciation was so late as to prevent the business from being properly executed, he was liable to an action, as he was if any damage ensued by the non-performance of a promise to become a depositary. We have now done with nominate contracts, and shall proceed to those which did not come under any of these specific classes, but were called by the name of innominate, for reasons which have been or shall be mentioned.

stead of lodging the money at his own house, he walked in the streets with the money about his person and was robbed; such a case not many years since came before a jury in Ireland, who gave the bailor a verdict against A.

(74) D. 17. 1. 12.

INNONIMATE

INNOMINATE CONTRACTS.

Contracts which arose from the express agreement of the parties (for supposed agreements produced merely by implication, were but *quasi* contracts) but to which agreements no specific name was given by the law, were therefore called innominate. These were such, in which the compensation for the use of a thing, or for labour and attention, was not pecuniary, but either; 1. the reciprocal use or the gift of some other thing, which class was vulgarly called *Do ut Des*; or 2. work and pains reciprocally undertaken, vulgarly called *Facio ut Facias*; or 3. the use or gift of another thing in consideration of care, or labour and conversely, *i. e.* *Do ut Facias*, and *Facio ut Des*. They were ranked into classes therefore by the considerations, by the thing given or done to induce the obligation; the reason is evident, because as their classes or divisions could not like those of nominate contracts, be descriptive of the ways in which they were formed, (inasmuch as these ways might be infinite,) there was no other method of arrangement but by the considerations which produced them.

To illustrate the nature of these contracts still further, let us take the instance of exchange. A.
lends

lends his horse to B. to work in the field of B. on condition of having the labour of B's. horse in his own, this is in the class of *Do ut Des*; it is not a *Mutuum*, the horse being an animal intended only for use, not for consumption; it is not a *Commodatum*, for there is a compensation; it is not a *Locatio*, for that compensation is not pecuniary; it is then the innominate contract, ranked from its consideration under the class of *Do ut Des*; for as ten thousand different instances may be imagined of these double bailments, they are not included under any nominate contract: if a mason or a carpenter, are each of them about to build a house, and agree, that one should finish the mason work, the other the wood work in their respective buildings, it is classed under *Facio ut Facias*; if a man contracted to give a parcel of plate or books, in

(75) It is not meant, that these considerations are not found in nominate contracts: The instances which Mr. Blackstone gives of them, are of nominate contracts: In the contract of sale, the consideration is, *Do ut Des*; in the contract of hiring out personal labour, it is *Facio ut Des*, but the thing given then is money, and there was no occasion in describing them to introduce the considerations, they having specific names; but in innominate contracts, there is no other mode of description possible.

consideration

consideration of another manumitting a slave, it was *Do ut Facias*; if a carpenter undertook to build a house for a mason, on condition, that the latter should give him not money, but a great quantity of mortar or brick, or other building materials, *fecit ut daret alter*.

As the infinite variety of agreements which might thus arise among men could not be foreseen or provided for, as settled specific forms of actions could not be previously prepared applicable to every case, the violation of an innominate contract was to be remedied by an action *ex præscriptis verbis*, formed in language applicable to the particular circumstances, and called also *actio in factum* or on the case (76).

The same vigilance and care was requisite in innominate contracts, as in nominate, according to the case.

QUASI CONTRACTS.

Obligations Quasi ex contractu (77), called also improper contracts, arose by implication

(76) From similar causes our action on the case came into use.

(77) Familiar to us under the name of implied contracts or assumpsits.

3 N

from

from circumstances without express or direct agreement ; the first noticed by the Institutes was *ex negotiorum gestione*, when one person assumed the care of the affairs of another without mandate in his absence and without his knowledge. The absent person was obliged to approve of what was well done, to indemnify the agent, to execute his promise, and reimburse his expences, if the undertaking was necessary. If the undertaking was unnecessary, any loss fell upon the busy intermeddler (78), who at all events, as he interposed his services without being asked, was obliged to use the most exact diligence.

The next was *tutelæ administratio*, by which the tutor was impliedly bound, tho' there was no express agreement between him and the pupil.

The obligations of joint-tenants to consent to partition, and of the heir to pay a legacy were especially enumerated among quasi contracts. But the obligation to repay money,

(78) Dig. 50. 17. 36. Quere in these countries, if a man without any order, intermeddle with the affairs of another, tho' to his advantage, could he have an action for his costs. I have known the case warmly contested in a Court of Justice, but it did not come to a decision.

which

which had been paid by mistake or in error, which gave right to the action called *condictio indebiti* (79), is much the most conspicuous in this chapter of the Institutes.

The Institutes having treated of the several species of contracts, terminate the third book with an account of the persons thro' whom obligations might be contracted, and the manner in which they might be dissolved. But they dwell merely on the rights accruing to the father or master, from the contract of the son or the slave, and do not mention any counter obligation which could fall upon him thro' their contracts. In fact none could, any more than from the contracts of the wife; their contracts did not bind him, nor their promises, but promises to them resulted to him (80).

Obligations, whether arising from proper or improper contracts, might be dissolved by ways infinite in number, *E. G.* *exceptione, testamento, pacto, sententia, jurejurando, tempore, by plea in bar, by bequest, by release or counter bargain, by decree, by absolving oath, by length of*

(79) Answering to our action for money had and received.

(80) Whatever the wife earns during coverture belongs to the husband. Salk. 114. the case of the slave cannot occur with us, and of the son is quite dissimilar.

time. The Institutes, however, treat only of such solutions as arise by mere operation of law, and among them select only the most remarkable: These were by payment; by *acceptilation*, which was a release without payment, where the creditor in solemn form of words admitted the payment of a debt which in fact he had never received; by *Novation*, which was changing the nature of the debt, as from a book debt to a bond debt, or changing the person of the debtor; *Mutuo Consensu*, when all the parties by agreement receded from an obligation not yet completed; this was peculiar to contracts by consent, or those called, as above, consensual. To these we must add some other remarkable modes, viz. legal tender, called *oblatio*; *compensatio*, which answered to our set off (81); and *confusio*, when the obligation of the debtor and right of the creditor united in the same person.

I shall conclude with one or two general rules applicable to all contracts.

All parts of the contract ought to be explained the one by the other, and regard had to the preamble of it (82).

(81) *As with us*, the debts set off must have been of the same kind, or due in the same right; and set offs could be only in contracts not in torts.

(82) D. 46. 1. 134. 1.

The

The intention ought to be followed rather than the words, and senseless words were to be rejected (83).

The interpretation of the contract ought to lean in favor of the obligor (84).

In all contracts, where no day of performance is added, the performance ought to be immediately (85).

He that is to pay, or deliver, is in no delay till after the last moment of the term appointed (86).

Contracts are to be adjudged according to the law of the place, where the contracts were made (87).

I have

(83) D. 50. 17. 32 & 92. and 73. 3.

(84) D. 45. 1. 38. 18.

(85) D. 50. 17. 4.

(86) Inst. 3. 16. 2.

(87) This rule is not *directly* taken from the Roman Law, which, it has been justly said, enjoying universal empire, had no occasion to provide for the case, but it has been extracted collaterally from that system by great and ingenious writers, and particularly by Huberus, who is above all others on this subject to be recommended to the reader's perusal, and not merely to the theoretic reader, but to the man actually engaged in practice. In a mercantile nation cases governed by this rule must daily occur.

To

I have now compleated my intention of giving a cursory view of the Civil Law, as treating of the rights of persons and of things. In the next book I shall proceed to consider public and private wrongs and their remedies. Before I conclude, let me again remind the reader of what has been said in the preface, that my object has not been to give a full and minute knowledge of the Civil Law, but to select the most useful and prominent parts, and to comprize them within a moderate compass, proportionate to the inferior importance of this study, in the present day, to that of the Common Law, in the Common Law forum. If deeper knowledge be desired, the books and

To this general rule there are some exceptions:

First, If the parties in making the contract regarded the law of another country.

Secondly if it violates the rights of persons not parties to it; as the marriage of a minor abroad, with a view of avoiding a statute at home.

Thirdly, It does not apply to immoveable property;

Contracts in which aliens are concerned, are between alien and citizen, or between two aliens, and may have been made here or abroad; in all such cases, I conceive, the cause of action being transitory, suit may be brought abroad or here.

titles

Le
titl
info
me
pla
T
mat
Lav
infi
the
Law
juris
prov
in c
ciple
circ
grea
adva
prais
willi
mina
atten
wher
and
" In
" ve
" ef

(88

titles of the Civil Law, containing the material information relative to each subject have been mentioned and pointed out, each in its proper place.

Tho' I admit, that the importance of information in the Civil Law to the Common Lawyer is comparatively small, I must ever insist that its utility to the lawyer as well as the advocate is positively great. The Civil Law, (says an eminent author) as a system of jurisprudence framed by wise men, and approved by the experience of many ages, must in every age, and every country, furnish principles which modified and applied as the altered circumstances of the times may require, will greatly contribute to the real interests and advantages of society; and tho' in courting praises to its civil provisions, I have been willing to sacrifice the character of its criminal code, we are in justice required to attend to those palliatives, which it every where introduces to soften its arbitrary maxims, and when it gloriously exclaims, "*Licet Lex Imperii solennibus juris imperatorem sol-
verit, nihil tamen tam proprium Imperii
est quam legibus vivere* (88)," we must

(88) Code, lib. 6. tit. 23. 3.

admit,

admit, that its practice mellowed its theory,
and that its language reprobated the abuse of
its principle.

APPENDIX.

A P P E N D I X.

Cases omitted in their proper Place.

MANUMISSION.

Keane v. Boycott, A. D. 1795.

2 Hen. Blackstone's Rep. 511.

QUESTION started in this case whether a master in the West Indies entering into a contract with his slave does not manumit him; the affirmative favoured by L. Ch. J. Eyre, condemned by the reporter, who insists that a slave cannot be manumitted by implication.

MARRIAGE.

Ilderton & Ilderton, A. D. 1793.

2 H. Bl. 145.

A marriage in Scotland between persons who do not go thither for the Purpose of evading the laws of England, will entitle the woman to dower in England.

DONATIO MORTIS CAUSA.

Hill v Chapman,

2 Brown, 612.

Gift of bank notes in a paper, accompanied with declarations, tho' not in *extremis*, a good donatio mortis causa. N. B. this contradicts the Master of the Rolls, Millar and Millar, 3 P. Wms.

3 O

COLLEGES.

COLLEGES.*

Bently v. Bishop of Ely.

2 Strange, 913.

Court said it was a question they would not determine, whether when the crown has given statutes and appointed a visitor, the successor can any way alter or annul the former statutes: the practice indeed has been otherwise, but it has never been determined to be good.

Attorney General v. Stephens.

1 Atkyns, 360.

Question made in Chancery whether Fellow of a College has a right to let his chambers; court refused to determine, and said it ought rather to be determined by the visitor; the question was on Doctor Radcliffe's Fellowships: said they supposed he had not left his Fellows under greater restrictions than those of other Colleges are liable to.

Ex parte Wrangham, A. D. 1795.

2 Vesey, Jun. 609.

Petition by Wrangham to the Lord Chancellor, as visitor of Trinity-Hall, Cambridge, (there being no heir of the founder) to declare the election of a Fellow void, and to order the petitioner to be admitted, the Court of K. B. having in a similar case declined jurisdiction; the statutes run thus: "*Quod in loco focii subrogetur* "*scholaris idoneus moribus & ingenio qui per tres annos* "*continuos ad minus jura Canonica aut Civilia audvit*

* Prynne's work on the 4th Inst. is a repository of knowledge relative to Colleges,

“ in universitate aliqua approbata :” With some exceptions not here material.

Petitioner insisted that he answered this description, and yet a member of another College was elected. The electors defence was in general terms, that Wrangham was not in their opinion a fit and proper person to be elected into the vacant Fellowship. Lord Chancellor decided against the petition, he was of opinion that the word *mores* has not only the more restrained sense of *morals*, but also the more extended one of *manners*, and that a *disfinitudo morum*, jarring tempers, discordant dispositions might mar the purposes of such institutions; and that of the disposition, as well as learning and manners, the society were to judge, not arbitrarily or whimsically, but by sound discretion, and upon due consideration of the statutes,

Quere, Tho' I do not mean in the least to dispute the authority of the determination of that high court in the above instance, to what dangerous latitude might it lead if ill understood: I should wish therefore that every Academic would read the case at large, and not trust to any abridgement of it.

I have not fulfilled my intention of inserting a note I made of the case of Price v. the College of Dublin, from this consideration, that tho' many important points were stated in it, none were absolutely determined.

A P P E N D I X.

P R O T E S T

OF

CERTAIN LORDS

AGAINST COMMITTING

THE PROTESTANT DISSENTERS BILL,

May 3, 1782.

Referred to in the Lectures on Marriage above.

Hodie secunda vice lecta est billa, entitled, An Act for the Relief of Protestant Dissenters in certain matters therein contained,

It was resolved in the affirmative, that the said bill be committed.

Dissentient,

First, Because it is apprehended that this bill professing to allow Protestant Dissenting Teachers to celebrate marriages between Protestant Dissenters, may encourage almost every species of clandestine and improvident marriages, not only between Protestant Dissenters of all denominations,

denominations, but between Protestants of the Established Church : for it is apprehended, that neither by this bill, nor by any other law now in being, can it be ascertained whether the parties be or be not Protestant Dissenters, so that any man and woman who may have gone once or twice to a meeting-house, or to hear a field preacher and calling themselves Protestant Dissenters may be married under the sanction of this bill by a Protestant Dissenting Teacher, whether he be a Presbyterian Teacher, an Independent Teacher, an Anabaptist Teacher, a Moravian Teacher, or any other Protestant Dissenting Teacher whatsoever. Nay, it is apprehended, that a degraded Popish Priest, a degraded Clergyman of the Established Church, and by the 6th George I. chap. 5. sec. 8. any man whatsoever pretending to holy orders and taking the oaths and subscribing the declaration therein prescribed, has under this bill a right to solemnize marriages ; and therefore the lowest and most profligate men in the state may instantly qualify themselves for that purpose.

Secondly, Because it is apprehended that such marriage may not only be celebrated by all such persons, but that as this bill makes marriages so celebrated good and valid to all intents and purposes whatsoever, those marriages are so far privileged that there can be no divorce a *vinculo*, for pre-contract, consanguinity or impotence ; for this bill gives to such marriages all the right and benefits of those celebrated by the Clergy of the Established Church, but does not subject them to the same objection.

Thirdly,

Thirdly, Because it is apprehended that under this bill marriages may be celebrated by all Protestant Dissenting Teachers with absolute impunity to themselves, between parties within the prohibited degrees of kindred, without publication of banns, without licence, in a private place at any hour of the night, without witnesses, without registering such marriages, between minors, and without the consent of parents, guardians, or of the Lord Chancellor, though such transgressions would subject a Clergyman of the Established Church to deprivation if beneficed, and to degradation if not beneficed, and in the case of a Popish Priest would be felony without benefit of clergy, and by making such marriages heretofore had good and valid, legal heirs may be robbed of their inheritance by this *ex post facto* law.

Fourthly, Because this bill makes valid to all intents and purposes whatsoever, all matrimonial contracts heretofore entered into between Protestant Dissenters, and solemnized by Protestant Dissenting Teachers, whether such matrimonial contracts were consummated or not, from whence it is apprehended, that such contracts, not consummated, will, by this *ex post facto* law, be of force to make void subsequent marriages consummated, and to subject women who are now lawful wives to be divorced, and their children to be bastardized, although by the 33d Henry VIII. chap. 6. and the 12th Geo. I. chap. 3. no contract of marriage, celebrated even by a Clergyman of the Established Church but not consummated, shall
make

make void a subsequent marriage which was consummated.

Fifthly, Because this bill by vesting generally in Protestant Dissenting Teachers without distinction an unregulated power of celebrating marriages, exposes Dissenters themselves and their children to all the evil consequences attendant upon clandestine and improvident marriages, equally with members of the Established Church.

And of the numberless sects of Protestant Dissenters no one denomination of them is guarded by this bill against clandestine and improvident marriages to be celebrated between persons of their persuasion by Dissenting Teachers of any other denomination whatsoever.

Sixthly, Because it was admitted in debate, that this bill is extremely defective; yet it was argued that it ought to be passed, because it may be hereafter amended, an argument which it is conceived would rather justify the rejection of a bad bill, to which this branch of the legislature is fully competent, than support the passing of such a bill, with a view to a future amendment of it, which cannot be obtained but by the concurrent agreement of all branches of the legislature; for this argument would justify the commission of an actual evil, which might be avoided, in order to apply a future remedy that possibly might never be obtained.

Seventhly,

Seventhly, Because those who opposed this bill did repeatedly declare themselves willing to vote for another bill, rendering all matrimonial contracts or marriages heretofore entered into between Protestant Dissenters, and celebrated by Protestant Dissenting Ministers or Teachers, as good and valid to all intents and purposes, as such contracts or marriages would have been if celebrated by the Clergy of the Established Church; and also rendering all matrimonial contracts or marriages hereafter to be entered into between Protestant Dissenters and celebrated by Protestant Dissenting Ministers or Teachers of their own respective congregations, under proper regulations, as good and valid to all intents and purposes, as such contracts or marriages would be, if celebrated by the Clergy of the Established Church.

Richard, Armagh,
Belmore,
Shannon,
Tractions,
R. Dublin,
Henry, Meath,
William, Waterford,
Clanwilliam,
Milltown,
Isaac, Cork and Ross,
Walter, Clonfert,

Charles, Cashel,
Bellamont,
Enniskillen,
James, Raphoe,
Carlow,
James, Downe and Connor,
Antrim,
Richard, Cloyne,
J. D. Leighlin and Ferns,
Charles, Kildare,
Charles, Elphin.

APPENDIX.

9

Act referred to in Lecture 6th, Book 1. p. 123.

Anno regni tricesimo quinto

Georgii III. Regis, Cap. 23 *.

An act to explain and amend an act passed in the tenth and eleventh years of the reign of King Charles the First, entitled, an act for preservation of the inheritance, rights, and profits of lands belonging to the church, and persons ecclesiastical.

Whereas doubts have arisen as to the validity of leases made under the powers given by an act passed in the tenth and eleventh years of the reign of King Charles the First, entitled, an act for preservation of the inheritance, rights, and profits of lands belonging to the church, and persons ecclesiastical; Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that it shall and may be lawful to and for archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries, and other dignitaries ecclesiastical, parsons, vicars, and likewise masters or governors and fellows of colleges, and masters and guardians of hospitals, from time to time to accept of a surrender or surrenders of any lease or leases of any lands or hereditaments, and thereupon to demise such lands or other

* This remarkable act, which changed a law considered as sacred for two centuries, but in which change of times may have required mutation, is here introduced to elucidate the notes to Lec. 6. part 1, page 123.

hereditaments belonging to their respective sees, churches, colleges and hospitals, (the dwelling houses used for any their respective habitations, and demesne lands thereunto belonging, and therewith used and occupied as the demesnes of their said houses only excepted,) unto the person or persons, in such manner and form as by the said act, or any other act or acts now in force they are enabled so to do, notwithstanding that upon such lease and leases there shall not be reserved and continued due and payable unto the lessors, and their successors, during the term of twenty-one years, so much yearly rent or profits, or more, as the moiety of the true value of the lands or other hereditaments, *communibus annis*, at, or immediately before the time of making such leases shall amount to.

2. And be it further enacted, that all leases heretofore made by any of the persons aforesaid, of any lands or other hereditaments belonging to their respective sees, churches, colleges, and hospitals, except as before excepted, unto any person or persons, in such manner and form, as by the said act, or any other act now in force they are enabled so to do, shall be valid and good, notwithstanding there was another lease, or estate, then in being, which did not expire, nor was ended and determined within the time in said recited act mentioned, and also notwithstanding that upon such lease and leases there were not reserved and continued due and payable unto the lessors during the term of twenty-one years, so much yearly rent or profits, or more, as the moiety of the true value of the lands, or other hereditaments,
communibus

communibus annis, at, or immediately before the time of making such leases did amount unto; provided that the yearly rent or profits which have been, or shall be reserved upon every such lease heretofore made, or hereafter to be made, shall not be less than the yearly rent or profits paid, and payable thereout for the last twenty years preceding the making of such lease, whether such lands or hereditaments be augmentation lands or others.

3. And whereas in many instances, lands and hereditaments belonging to archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries and other dignitaries ecclesiastical, parsons, vicars, and likewise masters or governors and fellows of colleges, and masters and guardians of hospitals, in right of their respective fees, churches, colleges and hospitals, upon surrender of the lease or leases then in being thereof, have heretofore been, and may hereafter be demised by one lease only, and have been, or may be afterwards, separated and demised by two or more distinct leases, with separate and distinct rents reserved thereon respectively; be it enacted, that in all such cases, whether such lands and hereditaments are augmentation lands or others, or both, that each and every of such separate leases shall be as good and valid in law, as the said original one lease would have been.

4. Provided always, that the several yearly rents reserved, or to be reserved on such separate leases do amount together to a yearly rent and profits, not less than the yearly rent and profits reserved and payable by

such one original lease, any law, usage, or custom to the contrary notwithstanding; provided that nothing herein contained shall be construed to authorize any of the persons or bodies corporate aforesaid, to make any concurrent lease, other than what they could respectively have made before the passing of this act.

END OF THE ACT OF PARLIAMENT.

MEMORANDUM.

The two following extracts from Irish acts of parliament, have been inserted, from my observation how much at a loss gentlemen particularly in England have been to know how our law was affected by the tenantry bill, and what acts passed in England are now of force in Ireland, since the statutes recognizing the independence of Ireland in 1782; *they are not totally irrelative to the subject, the first being compared with the Emphyteusis of the Civil Law, the latter necessary from the continued comparison carried on in the notes between the Civil and our Law.*

“ The stat. 19 and 20. Geo. 3. ch. 3. enacts, that
 “ Courts of Equity upon adequate compensation shall relieve tenants and their assigns against lapse of time, if
 “ no fraud proved. Unless it appear, that the fines
 “ were demanded, and refused or neglected to be paid
 “ within a reasonable time. Provided, that if the landlord

“ lord has any difficulty in discovering the tenant in or-
 “ der to make the demand, then demand on the land
 “ with notice in the Dublin and London Gazettes, shall
 “ be sufficient.

“ The stat. 21 and 22 Geo. 3. ch. 48. enacts, that
 “ all statutes heretofore made in England or Great Bri-
 “ tain, for the settling and assuming the forfeited estates
 “ in the kingdom of Ireland, and also all private sta-
 “ tutes made in England or Great Britain, under which
 “ any lands, tenements, or hereditaments in Ireland,
 “ or any estate or interest therein, are or is, holden or
 “ claimed, or which any way concern the title thereto,
 “ or any evidence respecting the same; and also all
 “ such clauses and provisions contained in any statutes
 “ made in England or Great Britain, concerning com-
 “ merce, as import to impose equal restraints on the
 “ subjects of England and Ireland, or of Great Britain
 “ and Ireland, and to entitle them to equal benefits;
 “ and also all such clauses and provisions contained in
 “ any statutes made as aforesaid, as equally concern the
 “ seamen of England and Ireland, or of Great Britain
 “ and Ireland, save so far as the same have been altered
 “ or repealed, shall be accepted, used or executed in
 “ Ireland, according to the present tenor thereof, re-
 “ spectively. Provided, that all such statutes so far as
 “ aforesaid, concerning commerce, shall bind the sub-
 “ jects of Ireland, only so long as they continue to
 “ bind the subjects of Great Britain.

“ And it further enacts, that all such statutes made
 “ in

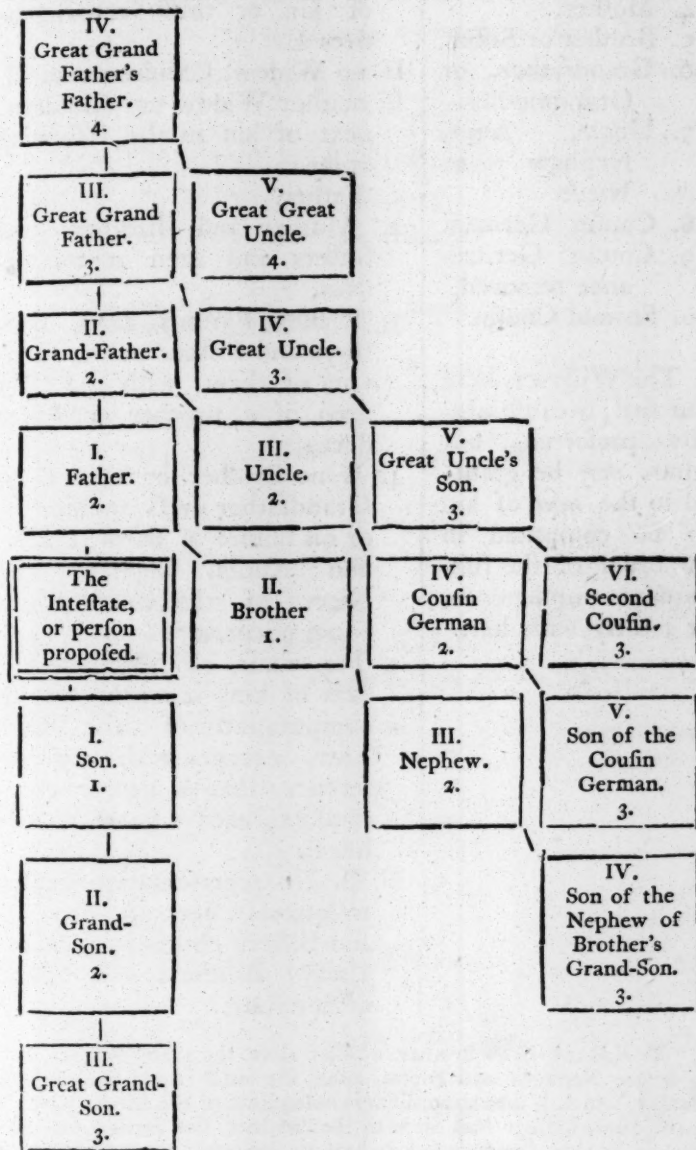
“ in England or Great Britain, as concern the stile or
“ calendar; and also all such clauses and provisions
“ contained in any statutes made as aforesaid, as relate
“ to the taking any oath or oaths, or making or sub-
“ scribing any declaration or affirmation in this kingdom,
“ or any penalty or disability for omitting the same, or
“ relate to the continuance of any office, civil or mili-
“ tary, or of any commission, or of any writ, process
“ or proceeding at law, or in equity, or in any court
“ of delegacy or review, in case of a demise of the
“ Crown, shall be accepted, used, and executed in Ire-
“ land, according to the present tenor of the same, re-
“ spectively.”

It cannot be denied, that these general words leave room for many doubts, and it still is often puzzling to determine what is the statute law of Ireland; To give a remarkable instance, perhaps, it would not be easy to say at this moment, whether the oath *ex officio* was or was not ever regularly and expressly, (however it may have been virtually) abolished in Ireland.

TABLE

TABLE OF CONSANGUINITY.

The numeral Roman Letters at the top expressing the degrees by the Civil Law, and the figures at the bottom those by the Canon Law.



Order of Administration.

1. Widow.
2. Child.
3. Father.
4. Mother.
5. Brother or Sister.
6. Grandfather, or Grandmother.
7. Uncle, Aunt, Nephew or Niece.
8. Cousin German.
9. Cousin German once removed.
10. Second Cousin.

The Widow is here put first, because usually preferred, but admn. may be granted to the *next* of kin to be computed in the order of the subsequent numbers to, or jointly with her.

Order of Distribution.

Widow $\frac{1}{2}$. Children or their Representatives the rest equally.

If no Children. Widow $\frac{1}{2}$, next of kin or their representatives $\frac{1}{2}$.

If no Widow, Children take all.

If neither Widow nor Children, next of kin in the following order.

1. Father.
2. Mother and Brothers and Sisters and their representatives.

3. If both Parents dead, Brothers and Sisters or the survivors of them, with the Children of a Brother or Sister deceased.

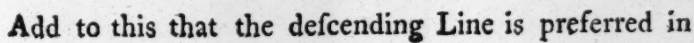
4. If no Brother or Sister alive, Grandfather or Grandmother, or on failure of them, Uncles and Aunts, Nephews and Nieces of the intestate, in equal portions*.

5. For want of all these the next of kin, according to the computation of the Civil Law, except with this difference, that a nearer collateral excludes a more remote lineal.

N. B. No representation among collaterals beyond Brothers and Sisters children, meaning always Brothers and Sisters of intestate.

* By this rule if no Brother or Sister alive, the grand Parents come in before Nephews and Nieces, altho' the latter would share with a Mother, which is the extraordinary consequence of the statute James II. in England, letting them in with the Mother, but leaving the preference of the ascending line (where no representation) in all other cases according to the statute of Charles II. Both these statutes are blended together in Ireland, in that of William III. chap. 6.

CIVILIANS.



infinitum and the certificate of the Civilians in the case of Carter against Crawley, viz. " Representatio in filiis
 " fratrum & sororum tantum locum habet, ad ultiores
 " vero collaterales non extenditur et vocantur ad succes-
 " sionem reliqui collaterales quicunque in gradu sunt
 " proximiores remotioribus exclusis ita quod infalabiliter
 " semper prior in gradu sit potior in successione." And the Civil Law, as it relates to distribution, will be very clear.



END OF VOL. I.

ERRATA.

EXPLANATION of Quotations, p. 16, for *Authentic* read *Authentics*.

Introductory Lectures, p. 51, is paged as 49.

Book 1. Lec. 2. p. 38, note 2, line 3, for *Oxenden* read *Oxenden*.

Lec. 2. p. 47, note, line 9, for *direction* read *discretion*.

Do. p. 48, note, line 12, for *showed* read *shewed*.

Lec. 4. p. 80, note, l. 9. after *children* a period. So after *nominis* in 15th line.

Do. p. 82, line 3, after *husband* a period.

Lect. 5. p. 91. note 6. of equal degrees, read *in* equal degrees.

Lec. 6. p. 108. 15th line, the semicolon should be expunged.

Do. p. 121. note 4th line, for *visitational* read *visitatorial*.

Book 2. Lec. 2. p. 143. 3d line from the bottom, for *belong* read *belonged*.

Lec. 3. p. 153. note, 6th line from bottom, the semicolon by being after *descents* instead of *family*, totally alters the sense.

Do. p. 157. 1st line, for *the* purchaser read *a* purchaser.

Lec. 4. p. 168, 2nd line, for *year* read *years*, and delete the comma.

Same page, note 7, line 5. for *he* read *the mortgagor*.

Lec. 6. p. 199. l. 6. for *administration* read *administrators*.

Lec.

infinitum and the certificate of the Civilians in the case of Carter against Crawley, viz. " Representatio in filiis " fratrum & sororum tantum locum habet, ad ultiores " vero collaterales non extenditur et vocantur ad successionem reliqui collaterales quicunque in gradu sunt " proximiores remotioribus exclusis ita quod infalabiliter " semper prior in gradu sit potior in successione." And the Civil Law, as it relates to distribution, will be very clear.



END OF VOL. I.

ERRATA.

EXPLANATION of Quotations, p. 16, for *Authentic* read *Authentics*.

Introductory Lectures, p. 51, is paged as 49.

Book 1. Lec. 2. p. 38, note 2, line 3, for *Oxenden* read *Oxenden*.

Lec. 2. p. 47, note, line 9, for *direction* read *discretion*.

Do. p. 48, note, line 12, for *showed* read *shewed*.

Lec. 4. p. 80, note, l. 9. after *children* a period. So after *nominis* in 15th line.

Do. p. 82, line 3, after *husband* a period.

Lect. 5. p. 91. note 6. of equal degrees, read *in* equal degrees.

Lec. 6. p. 108. 15th line, the semicolon should be expunged.

Do. p. 121. note 4th line, for *visitational* read *visitatorial*.

Book 2. Lec. 2. p. 143. 3d line from the bottom, for *belong* read *belonged*.

Lec. 3. p. 153. note, 6th line from bottom, the semicolon by being after *descents* instead of *family*, totally alters the sense.

Do. p. 157. 1st line, for *the* purchaser read *a* purchaser.

Lec. 4. p. 168, 2nd line, for *year* read *years*, and delete the comma.

Same page, note 7, line 5. for *he* read *the mortgagor*.

Lec. 6. p. 199. l. 6. for *administration* read *administrators*.

Lec.

ERRATA.

Lec. 8. p. 215. l. 7. for *to* read *by*.

Lec. 10. p. 248, 3d line from the bottom, dele the word testator's.

Do. p. 271, line 5, dele the word *however*.

Do. p. 282, the notes are entirely transposed.

Do. p. 318, in the note, last line but one, for *title* read *titles*.

Lec. 11. p. 345, for *Crediter* read *Creditor*.

Do. p. 360, note, 1st line, for *they are* read *it is*.

Do. p. 363, note, last line but one, insert *and* before the *even*.

Do. p. 364, 17th line, dele the comma after the word *as*.

Do. p. 370, last line, for *lie* read *lay*.

Do. p. 377, dele the comma after the word *care*.

Appendix, p. 2. last line, *audvit* read *audivit*.